IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

THE STATE OF TEXAS and **THE STATE OF MISSOURI**	§	**CIVIL ACTION**
VS.	§	**NO. 2:21-CV-067-Z**
JOSEPH R. BIDEN, JR., et al	§	

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TRANSCRIPT OF CONSOLIDATED HEARING ON
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
AND TRIAL ON THE MERITS
BEFORE THE HONORABLE MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

JULY 22, 2021

AMARILLO, TEXAS

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A-P-P-E-A-R-A-N-C-E-S

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Proceedings reported by mechanical stenography; transcript produced by computer.

VOLUME I (PAGES 1 - 196)

PROCEEDINGS FOR JULY 22, 2021

(The following took place in open court with all parties present.)

THE COURT: Please be seated. The Court calls Civil Action No. 2:21-CV-067, the State of Texas and Missouri versus President Joseph R. Biden, et al for a consolidated hearing on Plaintiffs' Motion for Preliminary Injunction and a trial on the merits under Rule 65(a)(2).

Are the parties ready to proceed?

MR. THOMPSON: Yes, Your Honor.

MR. WARD: Yes, Your Honor.

THE COURT: Okay. Counsel for the Plaintiff is present. Counsel for the Government is present.

Mr. Thompson, I'll ask that you introduce yourself and state your full name for the record.

Will you be lead counsel for the purpose of this hearing and trial?

MR. THOMPSON: Yes, Your Honor.

THE COURT: Okay. If you'll state your full name for the record so the court reporter may take that down.

MR. THOMPSON: Thank you. William Thomas Thompson representing the Plaintiff State of Texas and the Plaintiff State of Missouri.

THE COURT: And for the United States of America?

MR. WARD: Yes, Your Honor. Brian Ward for the

Department of Justice representing the Defendants.

THE COURT: Okay. We'll go through a couple of housekeeping matters. Nobody is on the clock at this point, and then we'll proceed.

As a reminder to the parties, the Court did adopt the parties' proposal for this sequence of argument. One and a half hours for Plaintiffs' opening presentation. Two hours of Defendants' presentation, and half hour reserved for Plaintiffs' rebuttal presentation.

Additionally, the Court did approve the parties' agreement to admit evidentiary materials without a sponsoring witness, so there's no need to go through that process.

The Court has ruled upon Defendants' Motion to Strike in an order filed Monday. The Court understands Defendants may still object to the use of extra record evidence. At the appropriate time, Defendants may object to Plaintiffs' use of evidence for record purposes and to preserve appellate review. The Court will defer ruling on the objection and will take the objection under advisement and will issue a ruling on the objection in the Court's written opinion to follow. And we'll do this pursuant to Rule 52.

Now, regarding breaks, the Court will break for lunch after Plaintiffs' opening presentation and will break again for fifteen minutes after the close of Defendants'

presentation.

Now, did both parties receive copies of ECF No. 85, the Order Denying Plaintiffs' Motion to Exclude Defendants' Exhibits?

MR. THOMPSON: Yes, Your Honor.

MR. WARD: Yes, Your Honor.

THE COURT: Okay. So we will be governed by the Court's ruling in that case. If there's any argument necessary to preserve appellate review, I'll let you make that at that time, and then, as I mentioned, will carry forward the Court's ruling in the written order.

Now, the Court did compile a glossary of terms for the benefit of the court reporter, and I'll just briefly ask lead counsel to review those terms. I know that there are distinct case names. There are some abbreviated terms. There are statutes that are recurring throughout the record. I want to make sure that the court reporter has those. If you'll review those glossary of terms, we can add to that anything you think should be added.

So we have here the Administrative Procedures Act, APA; Department of Homeland Security abbreviated DHS; Immigration and Nationality Act abbreviated INA; Migrant Protection Protocols abbreviated MPP; the Northern Triangle, which the Court will state for the record refers to Honduras, Guatemala, and El Salvador; *parens patriae*, a Latin term;

the Naturalization Clause; the Take Care Clause. And then I've identified it -- I've identified case names that may recur throughout the hearing.

Are there any additional glossary terms that should be added to that so that we can have -- have that on the record and also so that we can produce an expedited transcript, if necessary?

MR. THOMPSON: This looks fine to us, Your Honor.

THE COURT: Okay.

MR. WARD: This looks fine to us as well, Your Honor.

THE COURT: Okay. Now, one last item —— and it is tangentially related to that glossary term —— there are myriad *Texas versus United States* cases that you can find when you enter the Westlaw search, so if we need to identify that with particularity, I'll just ask that you give the citation, and, that way, I can pull it up on Westlaw, and we can also have it for the record.

At this point, with those housekeeping matters, are there any additional items on logistics, glossary terms, any questions that need to be addressed before we proceed?

MR. THOMPSON: Your Honor, I understand the Court's ruling on the lack of need for a sponsoring witness. I'm interpreting that ruling to mean there's no need to formally move to admit the exhibits because they're already in.

THE COURT: That's correct.

MR. THOMPSON: Thank you, Your Honor.

THE COURT: And is that the Government's understanding as well?

MR. DARROW: Your Honor, I'm Joseph Darrow on behalf of the Government as well. If Your Honor doesn't mind, I was going to handle the evidentiary objections for my colleague, Mr. Ward.

THE COURT: Okay.

MR. DARROW: And that's also our understanding that there's no need to formally admit. We had a question about the timing of the objections.

Does Your Honor want us to make them in the middle of their argument or kind of, you know, as they're referring to a piece of evidence, or wait until the end, or do them all at --

THE COURT: We can take up -- we didn't have a pretrial conference in this matter because of the scheduling. If you have a list of objections that you want to enter for record purposes and to preserve appellate review, we can have a brief hearing, a hearing before the actual trial on the merits where we can take up each of those. You can make your objections. You can preserve that for ruling.

Would you prefer to do that at the outset?

I would -- my preference is not to interrupt

counsel in the middle of argument.

MR. DARROW: Yes, Your Honor, that's fine. We can do it at the outset or at the end, however you prefer.

THE COURT: Okay. Is the State of Texas and State of Missouri amenable to that idea?

MR. THOMPSON: That's fine with us, Your Honor.

THE COURT: Okay. So I will allow you to proceed on these objections. You can do so from counsel table or the podium. We can take those up at this time.

You can enter -- please identify the exhibits or the documents that you are objecting to, state the basis of the objection, citing rules or cases, and then I will rule at the end of that -- I will note at the end of that that the Court is carrying those forward for final adjudication in the written Memorandum Opinion and Order to follow.

Does that satisfy the Government's need to preserve that?

MR. DARROW: Yes, Your Honor.

THE COURT: Okay. So if you will proceed with those objections, we'll get those on the record.

I will afford the Government of Texas and Missouri a brief opportunity to respond. We'll preserve those for the record, and then we'll begin.

MR. DARROW: Thank you very much, Your Honor. And I apologize for the length and onerousness of this list, but,

you know, just to get them all on the record.

So the Government's evidentiary objections are as follows:

To Exhibit A-7, the Fox News Article, "Border Patrol official expects more than 1 million migrant encounters this year." The Government objects on the basis of Rule 401. It's irrelevant and also relies on hearsay.

THE COURT: And is there a particular case law that you would cite for application of those principles to that type of news article?

It's just the rule, and you're just doing it by rule. There's no particular case that you would invoke explaining when news articles are relevant or in violation of 401 or hearsay. You're just using the rules.

MR. DARROW: I was just going to use the rules, Your Honor.

THE COURT: Okay. That's fine.

MR. DARROW: Just because there's a long list, and --

THE COURT: Okay. Go ahead.

MR. DARROW: Next document, Exhibit A-8, U.S. Customs and Border Protection Encounters, Southwest Land Border Encounters for Fiscal Year 2021. Also, Rule 403. It's irrelevant. That is an outdated website, and it was inaccurate and has been updated.

And if the Court doesn't find that's irrelevant, then on the basis of Rule 403 that the risk of prejudice and confusion does not -- is not substantially outweighed by the probative value.

THE COURT: I have your argument. Next exhibit.

MR. DARROW: Exhibit A-9, Associated Press Article dated April 1st, 2021, "Migrants freed without court notice – sometimes no paperwork." Again, the Government argues it's irrelevant under 401, not substantially -- the probative value does not substantially outweigh the risk of confusion or prejudice under Rule 403, and it relies on hearsay.

THE COURT: I have your argument. Next exhibit.

MR. DARROW: Exhibit A-10, NPR Article dated March 23rd, 2021, "Ex-DHS Chief Says Biden Was Warned About Dismantling Trump's Border Policies." Again, irrelevant under Rule 401. Probative value does not substantially outweigh the risk of confusion and prejudice under Rule 403, relies on hearsay.

And, additionally, with this one, it reveals conversation that is potentially subject to deliberative process privilege.

THE COURT: Next exhibit.

MR. DARROW: A-11. And should I read the name of the exhibit too or --

THE COURT: Oh, I have -- I have what's labeled as

Document No. 54. It's an Appendix in Support of Plaintiffs' Motion for Preliminary Injunction. I'm using that exhibit list and descriptions, so I'm following with you using that as a checklist. So I have the descriptions, at least as provided by the Plaintiffs. Is that adequate?

MR. DARROW: Yes, yes. All right. Then to expedite things, I won't, you know, read the full name of everything.

So Exhibit A-11, Government objects on the basis of irrelevance under Rule 401. The probative value does not substantially outweigh the risk of confusion and prejudice under Rule 403. And the article relies on hearsay.

THE COURT: Okay. Next objection.

MR. DARROW: To Exhibit A-12, similar, same three objections. Irrelevant under Rule 401, not outweighed under Rule 403, and relies on hearsay.

THE COURT: I have your objection. Next.

MR. DARROW: The Government objects to Exhibit A-13. This one also on the basis of lack of relevance under Rule 401. And, specifically, here, those statistics are outdated and only ran through 2016 before MPP, the Migrant Protection Protocols was even implemented, and includes and relies on hearsay statements.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: To A-15, the Polaris Project Report.

This document is also irrelevant under Rule 401, not substantially outweighed under Rule 403, and relies on hearsay testimony.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: To Exhibit A-16, and the objection there is that it's irrelevant under Rule 401.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: Document A-17, and the objection is irrelevant under Rule 401, and the probative value does not substantially outweigh the risk of confusion or prejudice under Rule 403.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: Would be to A-18, Exhibit A-18, which the same two objections; irrelevant under Rule 401, and not substantially outweighed under Rule 403.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: A-19, and the objections there are also Rule 401 and Rule 403.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: To A-20, and the objections are also Rule 401 and 403.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: A-21, and the objections are also Rule 401 and Rule 403.

And just to note, Your Honor, on the Rule 401

objection there specifically, again, those are outdated statistics that run through 2016 before MPP was even implemented, let alone terminated.

THE COURT: And 2016 is the relevant year for that analysis? The statistics terminate in December 2016?

MR. DARROW: Yes.

THE COURT: Okay. I have your objection. Next exhibit.

MR. DARROW: Is A-22, and that is also an objection under Rule 401 and 403, and lacks foundation as well.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: To Document B-4, and the Government's objection is that it's also irrelevant under Rule 401 due to being outdated, and those statistics have been updated and replaced, and also under Rule 403 as probative value does not substantially outweigh the risk of confusion and prejudice.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: Exhibit B-5.

THE COURT: B-5 or E?

MR. DARROW: B. B, Your Honor.

THE COURT: B. Okay. B-5?

MR. DARROW: B-5.

THE COURT: Please proceed.

MR. DARROW: The objections are also, under Rule 401, it's irrelevant, and under Rule 403 as not substantially

outweighed.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: To Exhibit B-7, and the objections there are also Rule 401 and Rule 403.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: Exhibit B-8, and that's also Rule 401 and 403.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: Exhibit B-9, Your Honor, and the objections are also Rule 401 and 403.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: B-10, and the objections are also 401 and 403.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: To Exhibit C, and the objections there are, reveals conversations that are potentially subject to attorney/client or deliberative process privilege. Also, the probative value does not substantially outweigh the risk of confusion and prejudice under Rule 403.

It states and relies extensively on hearsay, particularly the discussions of the back briefings of the new administration, and its conclusion offers expert testimony without qualification as an expert.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: It would be to Exhibit D. And the

objections there are also Rule 401 and 403, and also that the conclusion of the declaration there offers expert testimony without qualification or foundation for such expert testimony.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: To Exhibit E, any objections there are the same, Rule 401 and 403, and also this declaration offers expert testimony without qualification as an expert or a foundation laid for expert testimony.

THE COURT: And an assertion of privilege?

MR. DARROW: No assertion of privilege there, Your Honor.

THE COURT: Not on Exhibit --

MR. DARROW: Yes.

THE COURT: -- E?

MR. DARROW: Yeah. The assertion of privilege was just on --

THE COURT: For the declaration --

MR. DARROW: -- the declaration of Mr. Morgan.

THE COURT: Mr. Mark Morgan, Exhibit C?

MR. DARROW: Yes.

THE COURT: Okay. So I have the distinction. I have your objection. Next exhibit.

MR. DARROW: And that would be to Exhibit F and the attached exhibit to that, F-1. And the objection there is

that also irrelevant under Rule 401, objection under Rule 403, and the conclusion offers expert testimony without qualification or foundation.

THE COURT: I have your objection. Next exhibit.

MR. DARROW: To Exhibit G and the attachment, G-1, and the objections there are also Rule 401, 403, and that the conclusion offers expert testimony without qualification or foundation.

And just to elaborate briefly on the Rule 401 argument there -- I mean, we could have elaborated on all the 401 arguments, but just because of the laundry list, I want to just point out the -- the most glaring, in our opinion, ones.

This declaration refers to school finance, school finances related to unaccompanied alien children, UACs, and those are categorically excluded from the Migrant Protection Protocol eligibility.

THE COURT: Do you need no expound further on that?

That does deviate from the form of the objections that have preceded up to that point. Do you need any further elaboration on that point?

Because that does seem to be a particular argument. You can elaborate on that to greater detail to the extent you think is necessary.

MR. DARROW: Certainly, Your Honor. And so in that

declaration, Mr. Lopez discusses impact on local school finances based on providing for the unaccompanied alien minors that are sometimes placed in the state under the Office of Refugee Resettlement.

But the way the MPP program was set up, there are certain classes of non-citizens who were categorically excluded from being returned to Mexico under that program, and one of those classes was these unaccompanied alien minors, who were, you know, generally taken and placed in foster care in the United States.

THE COURT: Okay. I have your argument. Next exhibit.

MR. DARROW: To Exhibit H and the attachment, H-1, and the objections there are also irrelevant under Rule 401. The probative value doesn't substantially outweigh the risk of confusion or prejudice under Rule 403. The conclusion offers expert testimony without qualification or foundation.

And, also, there, it's unclear how much of the declaration is not based on personal knowledge as the declarant states that she's using a declaration that her predecessor used, and it refers to -- she just started in 2020, and the declaration refers to activities that took place in the preceding years.

THE COURT: And this is Exhibit H, Declaration of --

MR. DARROW: Yes.

THE COURT: -- Lisa Kalakanis?

MR. DARROW: Uh-huh.

THE COURT: Okay. Do you need to further develop that argument? That does seem to be an additional wrinkle to the form objections up to this point.

MR. DARROW: Yes. Although, honestly, it's unclear to the Federal Government what parts of the declaration are based on her personal knowledge and what parts are just based on kind of the -- this form declaration that it sounds like she copied over that had been commonly used by her predecessor.

THE COURT: Okay. I have your objection. Next exhibit.

MR. DARROW: And, finally, we're at the end, to Exhibit I, and the Government's objections there are also under Rule 401, 403, and the conclusion offers expert testimony without qualification or foundation.

THE COURT: Okay. And I did serve in the Appellate Division as an AUSA. I understand the necessity of preserving things for record purposes.

Are there any arguments that require additional explication for that appellate purpose?

The Court does intend to carry these forward. I'll give the Plaintiffs an opportunity to respond.

Is there any argument that deviates from form in such a way that you need to flesh it out with any additional particularity?

MR. DARROW: If I may briefly just on the two arguments that invoked deliberative process privilege, both of those pertained to documents relating to former DHS officials who were speaking after the fact. The one was the declaration of Mr. Morgan, and the other was the news article about Ex-DH -- A-10, Ex-DH chief, who was Chad Wolf. And both are discussing conversations that they allegedly have had with the incoming administration.

And in the Government's view, such conversations would be -- to the extent that they were not privileged under the attorney/client privilege, because they were discussing policy that was about to be created and potential lawsuits with lawyers, they would have been shielded by the deliberative process privilege because they were talking about the formulation of the administration's new policy on MPP and other immigration matters.

THE COURT: Okay. And so the deliberative process privilege is particular to Exhibit C, the Declaration of Mark Morgan, and the conversations reflected in Exhibit A-10?

MR. DARROW: Yes, Your Honor.

THE COURT: Okay. I have the Government's objections.

I guess I'm going to have to use -- I'm in criminal court mostly. I'm going to have to use a term different than "government" since we have --

MR. DARROW: Yeah.

THE COURT: -- two governments today in court.

(Laughter.)

THE COURT: So I have -- I have the objections of the United States. I find that they are preserved for appellate review purposes.

I will now hear a brief response from the State of Texas and the State of Missouri.

MR. DARROW: Thank you, Your Honor.

THE COURT: Mr. Thompson, whoever is taking the evidentiary objections may respond either from the podium or counsel table.

MR. THOMPSON: With Your Honor's permission, I'll let my colleague from Missouri, Mr. Osete, respond to the objections related to the Missouri witness, and I'll address the Texas witnesses.

THE COURT: Okay. So let's take those up in the order in which they were raised, and I'll give both states an opportunity to respond.

MR. OSETE: Thank you, Your Honor. Jesus Osete, Deputy Solicitor General for the State of Missouri.

And, as Mr. Thompson indicated, I will take the

objections to the A exhibits, and he will take the objections to the B exhibits.

I'll just note for the Court at the outset, these objections that the Government has made to the A exhibits are for the most part -- well, I would actually say all of them are pretty much public records. The Court can take judicial notice of public records, even for background purposes, which some of these exhibits serve beyond evidentiary value as well.

On the judicial notice aspect of it for public records, I cite to the Court the *Balogun v. Dimon* case. That's B-A-L-O-G-U-N. And that's actually from this Court from 2013, 2013 Westlaw 12128673. And it's well established in the Fifth Circuit that the Court can take judicial notice of public records, whether it be background or evidentiary matters.

I'll go quickly on the 401 and 403 stuff. I think they're -- they're pretty related. As I understand, Mr. Darrow had objections from A-7 through A-13, nothing about A-14, and then 15 through 22.

These documents, just briefly, Your Honor, they are relevant. They do go directly to the issues in this case, creating incentives for programs like MPP, terminating MPP, create incentives, perverse incentives for illegal immigration that affect these states. Many of these

documents, like the articles, do provide critical background to that.

The objections to 403 prejudice, we do think the probative value of these documents, aside from, again, you know, general background judicial notice that the Court can take, they do have substantial probative value that the Court can take into consideration. The Court does have discretion to consider those documents.

We don't think the Government would be unduly prejudiced by admitting them into evidence, again, beyond just the judicial notice aspect for background purposes.

In particular, on the -- there was a foundational objection made to -- I think it was the A-22. Yeah, A-22. This is the Transactional Access Records Clearinghouse. This is a program out at Syracuse University. And essentially what they're doing in that document -- and that's going to be at Appendix 288 to 296.

THE COURT: Yes. And this is -- in addition to the form objection on 401 and 403, this -- here, the Government raised a foundation objection, so if you would address that.

MR. OSETE: That's correct. Yeah, and all I'll say about foundation, it is a pretty low standard. In this case, if you look at those -- what those individuals are saying in that TRAC report, they're just taking information from the Executive Office of Immigration Review. For the court

reporter's sake, that's EOIR. They're taking data from MPP cases that were initially processed in Brownsville and some of the other divisions along the southern border and are now being transferred to places like Kansas City and places outside of the border in Texas.

They're just -- they're just looking at that data that the government has collected, EOIR has collected and just explaining what it says. And they're very up front about that at their report. I believe that's right at 296 where they explain their methodology. That's where they're getting it from. We've met foundation. It's a low threshold.

And I -- I think -- other than that, I think there was -- there was a point made about generally some of these documents being outdated. Look, a lot of these documents, they are estimates. For example, like the Pew Research Study from 2016 about how -- you know, roughly how many illegal aliens are present in the country in places like Missouri —— I think it's about 56 —— there's no question the study itself was performed in 2016 or it's dated in 2016. They are estimates.

We have other evidence in the record in the appendices about the numbers of illegal aliens that are actually coming into the country. Them being just simple estimates that maybe are outdated, and folks are still

collecting those kind of numbers even today, I think -- I think that's irrelevant to there being an issue with these dates, but, otherwise, I think it's a pretty low threshold on these studies.

So I don't want to go on too much on that one, but essentially they're just preliminary estimates. Ms. Pierce already indicated that these kind of -- trying to get numbers for human-trafficking victims is already inherently difficult because of fear of deportation and other external factors as well. These are just attempts to try to get these documents and this information.

And some of these other documents -- for example, on -- you know, I think there was an objection to the DESE study. This is A-19, the State Report Card for the state finances. Those are routinely collected by state agencies in Missouri, among some of these others costs that we put forward for purposes of our standing.

Again, these are routine documents that are also relevant to our standing. So I think we've met the 401, 403 threshold, and the specific objections that Mr. Darrow had, I believe I've also adequately addressed them as well.

So if the Court doesn't have any questions for me on that, I'm happy to yield to Mr. Thompson on the -- on part B.

THE COURT: Okay. So I have the State of Missouri

responses to the objections of the United States. I find that those responses are preserved for appellate review, that they are preserved in the record.

I'll now allow the State of Texas to proceed with its responses to the evidentiary objections.

MR. OSETE: Thank you, Your Honor.

MR. THOMPSON: Thank you, Your Honor. Will Thompson for the State of Texas. I will endeavor not to repeat what Mr. Osete had said. I will just incorporate by reference his points, especially with regard to 401 and 403.

I'll just add: This is a bench trial. I think the best place to see our arguments for any relevance and probative value of these evidentiary submissions are in our briefs. And I'll note that the text of 403 talks about the danger of misleading the jury, and we have no jury.

THE COURT: When there is no jury, yes.

MR. THOMPSON: I'll note that a couple of their objections with regard to relevance appeared to be that they believe the evidence to be wrong or inaccurate.

I think the best way to deal with that would be to introduce contrary evidence. And, you know, the Government has put in some evidence through the Administrative Record, and we can fight that one out.

With regard to the privilege, I think it's notable that -- I mean, all of these objections we're hearing about

for the first time. We didn't hear about them in the papers when they were submitted for the PI, but particularly with regard to privilege assertions, you know, some of these things are already out in the public record. They're complaining about information that is, you know, public in news articles and information that was on a PI docket and has been publicly disclosed without objection for weeks or months.

With regard to the relevance objection to Mr. Lopez's declaration —— this is the edu -- Texas Education Agency information —— counsel on the other side says that UACs are categorically irrelevant.

But, of course, Mr. Lopez's declaration goes well beyond that. It discusses how Texas incurs costs for the education of illegal alien children who attend public schools. That is true of UACs and non-UACs alike. It, of course, discusses the UAC data because that is the data that is available publicly.

But even if they were able to establish that the UACs were categorically irrelevant, the principle would stand, and Mr. Lopez's declaration explains all of that, I think.

THE COURT: And this is Exhibit G?

MR. THOMPSON: Yes, I'm sorry, that's Exhibit G.

THE COURT: Declaration of Leonardo Lopez. Yeah,

so this -- in additional to the Government -- I mean, the United States' form objection to 401 and 403, they had an expert objection there.

And is there anything else that you need to do to flesh out your response to that particular objection?

MR. THOMPSON: With regard to the expert objections, I guess two points, Your Honor. One is that I think they are really offering lay testimony. You know, this is information from TEA files, for example, from HHSC files, from TDCJ files. I don't think it requires expertise to give the information they have.

But to the extent it did require that, each declaration does lay out their qualifications, their job histories, things like that. I think they could qualify.

With regard to Exhibit H, this is the -- I believe this one is the HHSC declaration. My friend on the other side says that he's concerned it's not based on personal knowledge even though the declaration says it's based on personal knowledge.

My understanding of the source of his concern is a paragraph saying that the declaration was originally drafted by a previous staff member at HHSC. I think that paragraph was really meant to just say, I'm not committing plagiarism. You will notice that there's information in this declaration that previous people have sworn to, and she looked at that,

developed personal knowledge based on the internal HHSC data, and then swore to it in the declaration.

She's not saying, you know, someone else wrote this, and I haven't -- and I don't know what it means. She's saying, I have personal knowledge of this, but this -- the older numbers are the same as the numbers provided by previous declarants in previous cases.

And we'll get to this, Your Honor. You'll notice that many of our declarations are updated versions of declarations that have been offered in the DAPA case, the DACA case, the 100-day pause litigation. So I don't think there should be anything surprising about a witness acknowledging that.

THE COURT: Okay. And I think the sole remaining -- unless this overlaps the exhibits addressed by the State of Missouri, I think the only remaining substantive objection that should be addressed by the State of Texas is the deliberative process privilege as it relates to any exhibits on the Texas inventory. I think I have the State of Missouri argument on that point.

Are there any exhibits where that particular privilege objection should be addressed by the State of Texas?

MR. THOMPSON: I'll agree with what Mr. Osete said, and perhaps add that I believe, if I understand the Federal

Government's objection correctly, one of the complaints is that Mr. Morgan has revealed the fact that DHS staff gave certain warnings to the Biden transition team.

Even if one were not to consider the substance of the warnings but merely the fact that the warnings were made without disclosing anything that could even arguably be privileged, I think that would still support our point on the merits.

The idea here is, as we put in our reply brief for the PI, this was important information that they have not disputed was actually given, but even though it was given to high-level officials, they addressed it not at all in the June 1 Memorandum, and that goes to the importance of considering critical factors under arbitrary and capricious.

THE COURT: So I anticipate the Court's order adjudicating all of these objections and responses will tie those to particular claims, and on that particular privilege, I find already that it's most relevant to the arbitrary and capricious APA arguments, and the arguments that are already well briefed by both sides on that.

So the State of Texas agrees with the Court that that particular objection is most relevant to the APA claim.

MR. THOMPSON: That's how I'm understanding it, Your Honor.

THE COURT: All right. So is there anything

additional from the State of Texas?

MR. THOMPSON: (Shakes head.)

THE COURT: Anything additional from the State of Missouri to preserve the State of Texas and State of Missouri responses to the evidentiary objections lodged?

MR. OSETE: The only other one I would offer a very minor point, Your Honor, is, if you look at Rule 902, there's an exception for self-authentication for documents that purport to be issued by a public entity, which is another basis to also admit the -- some of these records that we've introduced.

THE COURT: Okay.

MR. OSETE: And that's all.

THE COURT: I have the argument of Texas. I have the argument of Missouri. The Court finds that they're preserved for purposes of the record and appellate review.

And, Mr. Thompson, you may return to counsel table. I will now briefly confer with my law clerks and make sure that I have all of the correct exhibit numbers, objections, and responses, and then we'll proceed with the hearing and trial.

(Court/law clerks sotto-voce conference.)

THE COURT: Okay. So we've compared notes. We can also order an expedited transcript, if necessary.

The Court will issue an order on all evidentiary

objections lodged at the hearing that will precede the Memorandum Opinion and Order on the merits. So those will intersect so that you have the Court's ruling and where the Court is relying on particular exhibits. It will be clear through the combination of those two orders what the Court is and is not relying upon.

So, at this time, I will allow the State of Texas and the State of Missouri to proceed with their case-in-chief.

PLAINTIFF TEXAS CASE-IN-CHIEF

MR. THOMPSON: Thank you, Your Honor. Will Thompson again for the State of Texas. And with Your Honor's permission, I'm going to use the ClickShare technology here to put a slide deck on the screen. I believe everyone, including opposing counsel, can see it.

THE COURT: And I just -- I just want to make certain that the United States can view what the Court is viewing. Are you able to view the screen as projected on courtroom technology?

MR. WARD: Yes, Your Honor.

THE COURT: Okay. So these are just demonstrative exhibits?

MR. THOMPSON: Yes, Your Honor.

THE COURT: Okay. You may proceed with those. And I have a screen here. My law clerks have a screen. If at

any point, the Government needs to see or view a particular frame, let us know, and we can accommodate that request.

You may proceed.

MR. THOMPSON: Thank you, Your Honor. Your Honor clearly is well versed in the briefs of this case, and I will endeavor not to repeat things that the Court already knows.

But I do want to address kind of three buckets of issues today. The first are threshold questions related to standing, final agency action, and reviewability. These go to jurisdiction in the APA cause of action.

The next bucket are the merits issues related to our four claims of the Administrative Procedure Act, the Immigration and Nationality Act, the Constitution, and the binding agreement between DHS and Texas.

The final bucket of issues relates to remedies. And with the Court's permission, Mr. Osete will, after I'm finished with the merits, address remedial questions as well as Missouri-specific questions like Missouri's standing.

And, Your Honor, I'll say up front that I, of course, have a presentation here that I'm intending to walk through, but I want to be helpful to the Court, and if at any point the Court has heard enough about a topic or would like to hear more about a different topic, I'm happy to be flexible on that.

THE COURT: Well, we'll do this like the Fifth

Circuit does. You'll get through your introduction, and then I -- the Judge will just interrupt you whenever.

(Laughter.)

MR. THOMPSON: Very well. Well, Your Honor, starting with standing, courts consistently find that Texas has standing in these kinds of immigration cases. We've seen it time and again.

And you'll see these cases are the ones we'll be relying on primarily. The DACA case from the Fifth Circuit. The DACA opinion; this is the most recent DACA opinion in the PI DACA opinion from Judge Hanen, not to be confused with the Supreme Court's DACA opinion in *Regents*, and, of course, the 100-day pause litigation in front of Judge Tipton.

And it's not surprising the courts in this state, in this circuit consistently find that we have standing. As the Supreme Court itself has recognized, the problems posed to the state by illegal immigration must not be underestimated. These are real and serious problems that have financial and other consequences for the State of Texas.

The kind of first point under standing is that the termination of MPP seriously increases the number of illegal aliens in Texas. There are two ways in which this is true, and I understood the Government's PI response to really only be disputing one of them. I think either is sufficient but both are relevant.

The first way is that aliens are released into the United States who would have been enrolled in MPP but for its termination. So you might call this like a primary effect, right? There's someone who comes to the border who under MPP would have remained in Mexico, but, with MPP being terminated, that person is instead released into Texas.

But there's also a secondary effect that is also well supported by DHS's own documents, and that's that the termination of MPP, or the lack of MPP, encourages aliens to make more border crossings, so more people come to the border, and we would have fewer border crossings if MPP were back in place.

And these are serious numbers we're talking about. It's not just a few people here or there. We have had 68,000-plus enrollees in MPP. And you'll see that I have citations at the bottom of this screen and many similar screens. AR555, for example, refers to the Government's Administrative Record at Page 555.

And the government itself has previously concluded that MPP decreases the number of aliens released into the interior of the United States. That's the facts underlying our standing. And we know that a lot of these releases are occurring in Texas. More than 50,000 of those 68,000 have been in Texas, according to the Government's own Motion to Transfer Venue.

The government concluded this was -- that MPP was effective in changing these numbers too.

So here is the 2019 Assessment. MPP returnees who do not qualify for relief or protection are being quickly removed, and aliens without meritorious claims, which no longer constitute a free ticket, are beginning to voluntarily return home. This is exactly the kind of causal connection that establishes standing because it shows that, when MPP is in place, the aliens are behaving differently.

Now, the Government makes a big deal about the idea that standing depends in part on the reactions of third parties, the aliens. But, of course, that's not unusual in these types of cases. It always happens in immigration cases, for example, so DAPA, DACA, the 100-day pause, the courts found it was proper there.

And the Supreme Court has found it in very similar circumstances, like in the *Census Bureau* case where the same objection was raised, I believe, by the federal government saying the State of New York couldn't have standing, because its theory that illegal aliens wouldn't answer the census questionnaire if there was a citizenship question included very much depended, not only on the idea that third parties would react in a certain way, but that they would react in a criminal way. And the Court nonetheless said, it's not categorically improper to rely on the reactions of third

parties. It's quite proper when there are predictable results.

And that's what they are here; they're quite predictable, as the previous courts addressing these issues have found.

Again, we have more quotes from the government. This one is in the Administrative Record as well saying that MPP contributes to decreasing the volume of inadmissible aliens.

And so here is some of the precedent that -- I'm sorry, here are the categories of injuries that have been previously accepted by courts in Texas and the Fifth Circuit. I can walk through them individually, tend to be longer with regard to the earlier ones, and skip ahead through the later ones, but I'm happy to adjust that according to Your Honor's preferences.

The first is driver's licenses. Next, education costs, healthcare costs, law enforcement costs, and the *parens patriae* injury based on labor market distortion to both Texans and Missourians.

And, again, we have these five independent theories, but any one of them would be sufficient. They also work together in combination. So I -- the Court really has options there on how to review that issue.

So with regard to driver's licenses, when DHS

releases aliens in the United States, they become eligible for driver's licenses under Texas law. This is addressed by Ms. Sheri Gipson from the Texas Department of Public Safety, which issues driver's licenses. It was also addressed by the Fifth Circuit. These licenses cost the state a fair amount of money.

Here is a table which is included in our Appendix estimating the cost to the State of Texas for different driver's license scenarios.

So we have these, you know, relatively large numbers here for large numbers of people, but, of course, that is not -- that is sufficient, but it is not required for standing. You know, any kind of financial injury will suffice. And this is what the Fifth Circuit approved in DAPA.

On to the education point, under *Plyler versus Doe*, the Supreme Court has declared that Texas, and all other states, are required to pay for the public educations of illegal alien children. And that costs the state a fair amount of money. Obviously, public education generally costs quite a bit of money. It costs quite a bit more when dealing with bilingual issues.

And so Mr. Lopez -- we had this discussion with regard to the UACs. This quote is about the UACs, but what he says in the declaration apply to non-UAC students as well,

and this is showing the acceptance of this theory in Judge Hanen's recent DACA opinion.

Judge Tipton accepted it as well in the 100-day pause litigation.

Healthcare is a very similar story. We have a number of programs in Texas that address the healthcare needs of illegal aliens. Some of them are, in fact, required by federal law to cover illegal aliens, such as emergency Medicaid. The HHSC declarant has explained what these programs are, what the numbers are, but they are very high, and here is a table explaining them.

So we have 80 million dollars for emergency Medicaid alone in 2019, very similar numbers in previous years. We can see that there is a reason that Judge Tipton accepted this theory with regard to the 100-day pause litigation. It is quite a bit of money, even from the other programs as well, and, again, emergency Medicaid is the one we're under federal regulations; it must cover -- it must cover illegal aliens.

I should add a note on that point, which is -- I think it is particularly compelling with regard to the injury that it is required by federal law, but it is not at all required for the injury.

As Judge Smith put it in the DAPA opinion, there's kind of a twin injury if you require -- if you -- if the

federal government changes a fact that increases Texas' costs under its own statutes, because they either have to -- the state either has to incur that financial cost —— here, you know, a million dollars for the family violence program —— or it has to change its laws, which is not something it has -- it can be required to do by the federal government. That represents kind of the back-stop injury that Judge Smith found in DAPA.

And, of course, like all of our declarants on these topics, our HHSC declarant has explained that this is not just true of the past, but it's true going forward. As the number of illegal aliens in Texas changes, the costs to the State of Texas will change as well.

And, of course, here are quotes from sister courts accepting this theory of standing, including Judge Hanen just last week, I believe.

With regard to law enforcement, we have the same story again, Your Honor, basically. It is that we incarcerate illegal aliens who have found their way to Texas. It costs quite a bit of money. In the last reporting period, it was 150 million dollars, and the federal government generously reimbursed us about 10 percent of that money, so, you know, 90 percent of that represents an injury to the State of Texas every time it happens.

Now, as we go on from here, I think it's important

to note that the Government says there's some speculation afoot, that we don't know whether a particular alien will, in fact, commit a crime and be incarcerated by TDCJ. And that's true insofar as it goes, but it's really beside the point, because what we do know is that under the law of large numbers it is going to be true that some of the aliens will commit crimes and be incarcerated or enroll in public schools or enroll in these healthcare programs or get a driver's license. We know that some of it will happen.

It doesn't have to be true that every alien released into Texas because of MPP will cause a financial injury to the State of Texas; though, that is relatively likely as the Fifth Circuit has pointed out in the DAPA opinion, for example. Getting a driver's license is a practical necessity in most, if not all, portions of this state. The same thing is true for people who don't have health insurance and things like that.

But as long as it is true of some of them, we have the standing. It doesn't have to be that every single one of them falls into these buckets. If any of them fall into any of these buckets, that is a sufficient injury-in-fact.

As the Supreme Court pointed out, it has decided major constitutional questions, the constitutionality of a poll tax based on a financial injury of $1.50. It's not -- it's not a big injury requirement. It just has to be a real

injury.

As to *parens patriae* standing, this is the same thing that was going on in DACA with Judge Hanen's opinion. The idea here is that illegal aliens distort the labor market because they drive down wages for Texans and Missourians who are lawfully allowed to work in the state.

I don't understand the Federal Government to be disputing, you know, the law of supply and demand. I think their main point seems to be that they believe states should not have *parens patriae* standing against the federal government ever.

I don't think I can improve on Judge Hanen's response to that point, which is that there's an important distinction between cases in which states are trying to challenge a statute and when -- and cases in which states are trying to get a statute enforced because the Executive Branch has gone rogue.

Here's Judge Hanen's opinion accepting *parens patriae* standing last week.

Now, unless Your Honor has questions about standing --

THE COURT: I do have -- I have two follow-up questions about standing. And we'll go back to the beginning when you were distinguishing your primary effects' argument, your secondary effects' argument.

And I want to particularize the inquiry to the persons creating the effects on Texas and also the perverse incentives. Is this caused by the increased number of parolees, as that terminology is used in immigration context, because the number of illegal aliens surpasses the government's detention capacity or because the termination of MPP caused a surge in illegal crossings?

So particularizing the inquiry to parolees and some of the MPP statuses that are at issue in this case, should the Court focus on sort of an overall effects test, or is there a particularized inquiry relevant to parolees?

MR. THOMPSON: So I think it is both. If I understand Your Honor's question correctly, there are -- the primary effect are the aliens who are released into the United States and the State of Texas in particular because of the lack of MPP.

The State of Texas' understanding is that those people are being paroled in unlawfully, but whether they are paroled or not is not necessary, I think, for standing. If they are released without papers at all, as some news articles have suggested, then that is equally applicable to our standing.

THE COURT: So especially as to secondary effects and incentivizing additional crossings, this Court is not invited to distinguish between the percentage of those

additional persons who are parolee status and those who simply evade detection or detention?

MR. THOMPSON: I'm not suggesting the Court can't distinguish between them. I think --

THE COURT: Okay.

MR. THOMPSON: I just mean both are sufficient, I suppose is what I mean to say.

THE COURT: Okay. And they are both -- it's the Government's argument that they are both related to the termination of MPP?

MR. THOMPSON: Yes, very much so.

THE COURT: All right. Now, regarding *parens patriae* standing, on Page 27 of your motion and also in your presentation today, you have referenced this labor market distortion theory. You've also referenced binding Fifth Circuit precedent that will guide the Court.

Again, I'm taking the general to the particular. What number should I look for to satisfy the Court's analysis that this distortion has, in fact, occurred?

So I'm -- I am bound by Fifth Circuit precedent. I am considering the Government's general theory of labor market distortion, but is there a particularized number that presents a tipping point for standing and injury analysis? Is it 10? Is it 100? Is it 1,000? Is it 10,000? Again, this is another particularization question.

Looking at the other cases that have been decided in the Fifth Circuit, is there a number that presents sort of a definitive tipping point beyond which the United States cannot really argue that there is no distortion?

MR. THOMPSON: Right. If I understand the question correctly, Your Honor, I believe the answer is: I don't know exactly what the number would be in some other case, but I do believe that we are well above it here. We're talking about --

THE COURT: "Pornography, I know it when I see it."

(Laughter.)

MR. THOMPSON: Well, I would hate to bind myself in a future case --

THE COURT: I think it's "obscenity" actually, but go ahead.

MR. THOMPSON: Right. The -- I think it is true that, when we're talking about the tens of thousands of people, that it's going to be very likely to be sufficient.

And it's important to note that there's kind of a tense question here, which is past effect versus future effect. Because we're looking for prospective relief, I think the standard should be: Is there a substantial likelihood, under Susan B. Anthony List, for example, that this distortion will happen in the future?

And so I think at the bare minimum we're talking

about, you know, 50,000 people, which the Government has conceded were released in Texas, but I think, in reality, we're talking about significantly more than that, in part because of the, you know, people moving from other states, but also the secondary effect of the termination of MPP causing more people to cross the border.

So when we say that there is a -- you know, there's back to being a free ticket in the United States, that it creates perverse incentives, as the Government said, I think that means that we shouldn't expect the number of people distorting labor market to be the mere 50,000. I think we can expect it to be significantly higher than that.

THE COURT: Okay.

MR. THOMPSON: And I guess the last point is, I think as a general matter of economics, all of these things operate on the margin. And so there is no tipping point at which, you know, there is a distortion because there are 10,000 people, but there wouldn't have been a distortion at 5,000 people. It's -- you know, there's twice the distortion at 10,000 than there was at 5,000. It's a continuous variable rather than a binary one.

THE COURT: Right. And, you know, the Supreme Court has given recent guidance in a different context with First Amendment pro bono litigation that nominal damages are sufficient for standing analysis, things like that.

I'm just -- I want to make sure that I'm using the correct numerator and denominator in deciding this. And it would be the State of Texas and State of Missouri argument that whatever that threshold is, it's easily met in this case based on the evidentiary record which reflects tens of thousands, not one or two persons?

MR. THOMPSON: Right.

THE COURT: Okay. You may proceed. I have your argument on standing, if you want to move to your next argument.

MR. THOMPSON: Thank you, Your Honor. As to final agency action, this is another threshold requirement as to the APA claims. So, under 5 U.S.C. Section 704, states and other plaintiffs are allowed to challenge final agency action. That is a term of art that the Supreme Court has interpreted a little bit atextually.

So, in *Bennett versus Spear*, we have two elements as to final agency action. The first element is that the action has to be, you know, final rather than tentative or interlocutory. It has to be the end of the decision-making process.

I don't think there's any dispute about that here. The June 1st Memorandum, as you'll see on your screen says: I hereby rescind effective immediately. I further direct DHS personnel effective immediately. This isn't a tentative

decision that will be, you know, reviewed by some higher power within DHS.

The second element is that the action must be one by which rights or obligations have been determined or from which legal consequences will flow. Now, we have -- we have a number of arguments on this point in our briefs, but I think the easiest way to resolve this question is to look at *Texas versus EEOC*, a relatively recent Fifth Circuit opinion. There, the Court held, if the agency's action binds its staff, if that is true, demonstrates that legal consequences flow from it.

Now, we just saw on two slides ago that the June 1 Memorandum directs DHS staff to take certain actions. That is, of course, binding. It's an order from a superior, and under *Texas versus EEOC*, that satisfies the second *Bennett versus Spear* prong.

And unless Your Honor has questions about finality, I'll move on to reviewability, a topic addressed in 5 U.S.C. 701(a).

THE COURT: You may proceed. No questions on finality.

MR. THOMPSON: So there are two -- two ways that the Government can try to rebut the presumption of reviewability. They can show that a statute precludes judicial review or that agency action is committed to agency

discretion by law.

I know -- I think the starting point for this analysis has to be the presumption that I mentioned. It's in, you know, many of the Supreme Court's opinions, including *Regents* about the DACA recision.

But the DAPA opinion from the Fifth Circuit is particularly clear and gathers a lot of the citations. Establishing unreviewability is a heavy burden, and where substantial doubt about the congressional intent exists, the general presumption in favor of judicial review is controlling.

I think that's important here, because, as we walk through the individual factors, we'll see that, you know, there's nothing clear about any kind of intent to preclude review here.

First, as to statutes precluding judicial review, as I understand the argument from my friends on the other side, there's no dispute that the statutes in question don't say states can't sue about this. Most of the statutes they cite are limiting review by aliens themselves.

So, you know, there will be -- there are -- of course, Your Honor probably knows all of this, but there are options for illegal aliens to have administrative and then judicial review of their proceedings in front of DHS.

And what these provisions do that the Government

cites is kind of limit and guide how that review occurs. They just don't have anything to do with this situation here, where we're not aliens, and we're not in removal proceedings.

The Government, I think, if I understand them, says, well, the fact that there's a detailed review scheme for other people in other circumstances shows that you shouldn't be able to sue in these circumstances.

I don't think that's right, Your Honor. I think they're massively over-reading the -- I suppose the partial-implied repeal of the APA by the INA. That would render all of the recent immigration cases wrong, I think, not just the ones that Texas has won, DAPA, DACA, 100-day pause, but I think *Regents* would be wrong.

The Supreme Court would have been wrong to consider a California state entity challenging immigration decisions, because, of course, the regents of the University of California are not immigrants in review proceedings either.

But, you know, that is not how any of these cases have turned out.

As to the second point, agency action is committed to agency discretion by law, that is similarly a high standard. The same presumption applies, and we cited those cases in our brief.

As I understand the Government's argument, the main point here is that the statute says "may," which it's true;

the statute says "may," but that just means there is some level of discretion in some circumstances. That doesn't mean, one, that there's discretion in these circumstances, or, two, that when there is discretion, it is unreviewable.

So taking those in that order, the first point is, we, of course, have a substantive argument under 1225 that the government lacks discretion in these circumstances. If that's true, then it is necessarily not committed to agency discretion by law. That's how Judge Tipton proceeded in the 100-day pause opinion, for example.

But, even without the 1225 argument, the Government is failing to distinguish between the type of discretion that is reviewable and can be abused from the type of discretion that can't be.

Judge -- Justice Gorsuch addressed this in the *Weyerhaeuser* opinion that we cited. The statute itself, 5 U.S.C. 706 talks about holding unlawful and setting aside agency action for an abuse of discretion.

The Government's argument would render that statutory language superfluous, because if any amount of discretion just from the word "may" rendered everything unreviewable, then there would be no circumstances in which a court could hold unlawful and set aside anything as an abuse of discretion.

I think the clearest example of this is the *Regents*

opinion from the Supreme Court. There, the Supreme Court said everyone acknowledges that the DHS administration can rescind DACA. It's within their power to do. They have the discretion in some sense. And, yet, it wasn't unreviewable. The Court looked at it extensively, held it was reviewable, and held that it, in fact, was arbitrary and capricious.

So the point there is, there's a large difference, as Judge Friendly pointed out in that Second Circuit opinion we cited. There is a type of discretion that is unreviewable. For example, elsewhere in 1225, if the fed -- the Congress said that DHS shall have sole and unreviewable discretion, that's the kind of thing where we can't overcome the reviewability bar.

But where Congress just happens to use the word "may," then, of course, we can overcome it, because all arbitrary and capricious review is about things like what if the government, in exercising its discretion, failed to consider some important factor.

So, I mean, that's where we are on reviewability. Unless Your Honor has further questions on that, I will turn to the merits of our claims.

THE COURT: Okay. You may proceed.

MR. THOMPSON: Thank you, Your Honor. Under the APA —— so we'll do arbitrary and capricious first —— the reviewing court shall hold unlawful and set aside agency

action that is arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law.

One of our main points in the arbitrary and capricious section is that DHS ignored critical factors when terminating MPP, and that's arbitrary and capricious under cases like *State Farm*.

Before MPP, there was a very serious problem. Asylum applicants without meritorious claims remained in the country for lengthy periods of time. It created perverse incentives, according to DHS in October of 2019, and MPP was the solution. MPP, according to the DHS, was going to reduce the number of aliens taking advantage of U.S. law and discourage false asylum claims.

And then when DHS reviewed it after implementing MPP for awhile, they found it was effective. MPP returnees that don't qualify for relief being quickly removed, no longer a free ticket. They're beginning to voluntarily return home. That's exactly what we want to have happen.

But DHS ignored all of that. They didn't address anything about perverse incentives. They didn't address anything about the free ticket that would be created to illegally enter the United States without MPP. They didn't discuss the 2019 Assessment.

Now, we've obviously had some recent dealings about the 2019 Assessment, and we respect Your Honor's opinion that

it is part of the Administrative Record, but I think that the end of Your Honor's opinion is what's crucial here. There is no indication that the federal government actually considered it or discussed these factors in the June 1 Memorandum.

So the fact that it's added after the fact to the AR, I don't think tells us anything precisely because the June 1 Memorandum explains its own rationales and doesn't say anything about the assessment or the facts that underlie it. Nor do they say anything about the transition warning from career employees, just as we discussed with regard to the evidentiary issues. The point here is, if the federal government receives serious and credible warnings that very bad things are going to happen if they take a course of action, they need to address that possibility when issuing agency action, and they did not do so here.

Stating that a factor was considered is not a substitute for considering it as the D.C. Circuit has held, and, of course, the D.C. Circuit has considerable expertise in administrative law.

DHS also ignored the cost to the states, including Texas and Missouri here. This is something that Judge Tipton found important and dispositive in the 100-day pause litigation. He called it a clear and obvious responsibility to consider the relevant factors, which by all intents and purposes included Texas' expenses and costs.

It's worth noting, Your Honor, that this is the second memo we have gotten on MPP. And, of course, we had a preliminary -- we had a complaint and a preliminary injunction complaining about this very fact. We said, DHS declines to consider Texas' costs once again. And DHS went back, wrote a new memo.

Parts of it seemed like it were -- they were meant to address things we had said in our complaint, but they seem to have consciously chosen not to address Texas' costs again despite the precedent from Judge Tipton. So I think it's a glaring omission in the June 1 Memo.

Moving from what they ignored to what they said, I'm afraid it doesn't get any better. DHS's stated reasons were facially arbitrary. Two points here: The in absentia removal rates as well as court closures.

So as to the removal rates, DHS puts this incredible focus on the idea that there's an allegedly high percentage of in absentia removals, 44 percent. They say it raises questions. They don't answer any of those questions despite reviewing the program, but they say it raises questions.

But there's no way to say whether it raises questions without knowing the answers to other questions, like: Is 44 percent actually high? If so, is it -- the move to 44 percent based on MPP at all? That's not something that

DHS addresses in the June 1 Memo.

And, as it turns out, in absentia removal rates are always high, and they jump around for reasons completely unrelated to MPP.

So you can see this from the federal government's own website. We see in absentia removal rates that range from the mid 30s to the low -- to the high 40s, excuse me, and we see things like an eight-point jump between 2014 and 2015. That obviously has nothing to do with MPP. These numbers just move around. There are clearly other causes at play.

And we see that, you know, some of these rates get up to 43 percent in 2017, which the Government says, you know, is -- you know, 44 percent is the real problem, but apparently 43 percent is just fine. I have a hard time believing that a one-percentage point change has any real effect here, much less that it can be attributed to MPP.

And the last point on this topic is, there's nothing nefarious about in absentia removal rates even if they did go up and even if it did go up as a result of MPP. MPP was designed to encourage people who made false asylum claims to abandon them and no longer make those types of claims.

So the fact that someone who wanted to get a free ticket into the United States based on a false claim of

asylum then says, oh, you're not going to let me into the United States; I'm instead going to have to remain in Mexico; well, then I guess I'll just give up on this process and go back home, that's not a problem. That's a feature, and it's exactly the feature that DHS itself recognized in October of 2019 saying that they were beginning to voluntarily return home. A significant portion have chosen to abandon their claims.

Now, the federal government has many options, of course, in many situations about how to deal with these types of policy considerations. They always have the option of saying under arbitrary and capricious review, well, you know, sure, we think that's a problem, but we think it's outweighed for these reasons, but we don't have that here.

It's just like the *Regents* case where, sure, the Trump Administration could have said, according to Chief Justice Roberts, yes, there are reliance interests, but we think they aren't as important on these facts because they're outweighed by some other consideration. But they didn't, and that was enough to set it aside.

The same thing's true here. Perhaps DHS could try to reweigh the factors. We would have to address that when it happened, if it happened. Of course, we don't know the answer to that on the front end.

But they didn't even do any of that. They didn't

say, oh, it's okay that they're abandoning meritless claims. We want -- but, you knows, it's overcome by some other reason. They just misinterpreted the data and applied logical fallacies.

Now, in the response brief to our PI, counsel for the other side has, you know, put up a valiant defense of the numbers; said that, you know, we're misinterpreting them; that actually the comparative should be something else other than what we've cited.

I will confess that I was not able to recreate the numbers in their brief from their citations in their brief, but just even assuming that it did work out in some way, it would remain counsel's post hoc rationalization and inappropriate under *Chenery*. So, even if everything my friend on the other side said were fully persuasive as to the relevance of the in absentia removal rate, it's still not something that Secretary Mayorkas said in the June 1 Memo.

The last point on this is that the -- the previous court closures. So in the June 1 Memo, Secretary Mayorkas refers to problems that stemmed from COVID basically. COVID led to immigration courts being closed, and that, as with all processes throughout the country, really threw a wrench in the gears apparently.

But that's irrelevant, because the memo itself says they reopened in April of 2021. So it's not clear how the

federal government can rely on superseded past events that are no longer causing effects to say that it should prospectively terminate a program. I think that's arbitrary and capricious for the same reasons.

Lastly, I'll note that we have some carryover between our arbitrary and capricious argument and our substantive 1225 argument. The idea here is that DHS ignored the effect of terminating MPP on its ability to comply with Section 1225's mandatory detention requirements.

And I think it makes the most sense to discuss that in the substantive section, but I'll just note that it is, in fact, a part of our arbitrary and capricious claim as well.

So, under the INA, Section 1225 offers Defendants a choice. One, the Defendant can detain as required by 1225(b)(2)(A) if the alien is in the United States, or, under paragraph (C), DHS can let the alien remain in Mexico under a MPP-like program.

Now, the Defendants say that they can't use these two options -- or, excuse me, they say they can't detain everyone because of resource constraints. There are a number of citations for this. We've put them in our brief. But App.307 is talking about resource constraints. We have the custody and transfer statistics pointing out the same problem. They say, continued detention is not in the interest of resource allocution or justice.

This is from the Administrative Record. I'll note that the Court has heard evidentiary objections to news articles that were contained in our evidentiary appendix. The Defendants also include news articles in their Administrative Record, so the Reuters' article at AR183 notes that DHS has the discretion to parole people who are not eligible for bond and frequently does so due to insufficient detention space.

The same article quotes Professor Vladeck from UT for the proposition that the number of asylum seekers who will remain in detention will almost certainly be a question of detention capacity and not whether the individual circumstances of individual cases weren't release or detention.

Now, these are things that Defendants themselves chose to put in the record.

THE COURT: And the Court is carrying forward evidentiary objections in ruling on those objections. The order on those objections will be paired with the Memorandum Opinion and Order, so that the parties are clear on which documents the Court relied on or excluded.

But I do want to address just briefly, and I don't want this to descend into an evidentiary hearing —— I vastly prefer this oral argument design that we've set up —— Page 6 of the Motion to Strike though, Defendants note in that

motion that the CBP website no longer contains the footnote that supported Plaintiffs' initial argument that parole was being granted on a class-wide basis.

Given this extant or missing footnote, how should the Court evaluate the now missing footnote moving forward and what weight should the Court give to that?

MR. THOMPSON: So I think the footnote deserves all the weight it bears as a result of just reading its text. It was on the government's website. It is a self-authenticating document.

Usually, these government websites are subject to judicial notice as well. And now it is true that counsel has said -- I guess that counsel believes it to be inaccurate, but as far as I know, we don't have any evidence that it's inaccurate. We don't have a declaration or something that says, no, I typed the footnote, and I was mistaken for some reason. Instead, what we have is I think independently sufficient but also confirming evidence from the things that we've just put on the screen and other things cited in our brief.

So I suspect the footnote -- or, excuse me, my position is that the footnote is entitled to evidentiary weight, but I don't think it's required. I think the same fact-finding is supported by other evidence.

THE COURT: Okay. And just I will instruct the

United States, whether through Mr. Ward or Mr. Darrow, if you reach a point where those motion to strike issues are relevant and that CBP website is relevant to your argument, I'll hear any response to that now missing footnote.

I know that that featured prominently in the motions practice on strike, so if there is any response from the Government, I would just ask that you supplement your presentation to include that.

So you may proceed.

MR. THOMPSON: Thank you, Your Honor. So MPP lowered the number of aliens who needed to be detained relative to the detention space available.

The point here is that, when the government says we don't have the resources to detain everybody, then that -- that raises the question: Well, what is the ratio of people who need detention to the detention space available?

MPP made that ratio more favorable to compliance with the law by giving the government the option of letting people remain in Mexico and thereby reducing the number of people who needed detention in the United States. So it was a lawful option that helped the government comply with its obligations of mandatory detention under Section 1225. And the Government itself acknowledged this point.

So this is from the metrics and measures document in the Administrative Record that the Secretary says he

relied on in his June 1 Memorandum. The goal of MPP, one of the goals was to prevent catch and release, including for people who turn out to be filing false asylum claims. And they found that MPP, in fact, reduces the number of aliens released into the interior of the United States. So that was the goal, and it was being effectuated.

According to Mr. Morgan, in FY -- fiscal year 2019, CBP was releasing more than 200,000 illegal aliens, and then in 2020, in large part directly related to MPP, CBP released fewer that 1,000. This is a big deal.

The compliance with federal statutes, of course, matters, and we shouldn't -- the courts know that a child who murders his parents can't plead for sympathy on the basis that he's an orphan.

THE COURT: Chutzpah.

(Laughter.)

MR. THOMPSON: So neither can the federal government, which has tied its own hands, saying, oh, we couldn't possibly comply with our detention obligations because we're letting so many people in without MPP that we can't detain them all, and say, but don't worry about it, because it's a completely separate problem; we just can't do it; it's resource problems.

They can solve their own resource problems by not enacting the unlawful memorandum terminating MPP. And even

if it didn't completely solve their resource problems, it would at the very least lessen them. It would certainly lead to fewer violations of Section 1225.

And while we would strongly prefer the federal government to fully comply with Section 1225, partial compliance would at least be an improvement.

THE COURT: Okay. So we are -- we're at a point where the Court will interrupt to ask a question about termination of MPP and how this does intersect with prior court rulings at the District Court level and above on DACA, so that's D-A-C-A.

The termination of MPP does not itself, unlike DACA, create affirmative benefits. It is the government's decision to parole illegal alien detainees into the United States that creates affirmative benefits and burdens the state.

Isn't Plaintiffs' case truly a challenge to the government's parole practices and not the termination of MPP?

MR. THOMPSON: No, Your Honor. We're not challenging, you know, any kind of individual grant of parole or even the parole policies. What the parole policies provide are the legal context for understanding how the termination of MPP plays out in practice.

So I think the key sticking point between the parties is that everyone agrees that under some circumstances

MPP is voluntary. It's a discretionary option of the federal government. And so if the government were going to detain everyone who it doesn't enroll in MPP, as required by 1225, that would be fine. We -- then, you know, the termination of MPP wouldn't violate Section 1225.

But the problem is, they're not doing that. They agree they're not doing that. I think the evidence about resource constraints shows they're not doing that, but another piece of the evidence showing that they're not doing that is the parole evidence, showing that what they are doing is releasing a -- releasing on parole a class of individuals based on the, you know, class-wide ground that DHS lacks resources to detain everyone. Whereas, what parole was supposed to be, both originally and especially after Congress clarified the statute, is a case-by-case humanitarian program.

All right. So you're supposed to look at a particular alien and say, ah, well, you can be paroled in the United States because you need to get a medical service provided by a doctor here or something like that. It is not nearly the same thing as saying, well, you know, everyone who comes in on Tuesday has to be released because we don't have any more beds.

THE COURT: It's a -- you know, we -- you know, everybody's fond of quoting Justice Scalia these days and his

books on canons. We can cite canons distinguishing the general from the particular, a case-by-case adjudication versus a categorical determination. We can pick our favorite Latin to explain this difference, but I think I understand the Government's response here.

This bleeds in to the section of your presentation on Take Care, but I think it's also relevant to the INA claim, whether review is limited by statutory text itself. So does 8 U.S.C. Sections 1226(e) —— and that's the judicial review provision there —— 1252(a)(2)(B)(ii) —— and that's a judicial review section —— 1182(d)(5)(A), as instructed by the *Trominksi* opinion by the Fifth Circuit, or any other statute or cases interpreting same, prohibit this Court's judicial review of Defendants' parole practices as compared to individual parole determinations?

So, in addition to sort of the theoretical question that I just presented, I want to take it to the particulars of the statutory language of the judicial review provisions, and then pair that with any case -- case law.

Do you know of any other statutory provision or case interpreting same that would hold that those judicial review sections prohibit this Court from reviewing those decisions, or do I have the universe of statutes and cases I should consider, the aforementioned sections and *Trominksi*?

MR. THOMPSON: I think Your Honor has it. I think

there may be two conceptual distinctions, and I just want to make sure we have them both clearly explained.

So one is the difference between a challenge, like, to a particular grant of parole, right? So that's clearly different than what we're doing. But it's also different than a challenge to a hypothetical agency memo about parole. We're also not challenging a final agency action that's, you know, here are our parole practices, right? All we're using --

THE COURT: Which would sound more in prosecutorial discretion and be within the purview of the Article II Branch and all that.

You're not -- I don't take the State of Texas or the State of Missouri to challenge that sort of triage prioritization that the Executive Branch has to make.

MR. THOMPSON: No, we've not challenged that, and there's another reason, Your Honor. I don't have a final agency action to put before you. I mean, if we get one, perhaps there will be a different case where we can raise those arguments.

But, no, the -- the way these statutes work in terms of review is, I think the focus has to be on what is the Court potentially setting aside.

THE COURT: Right.

MR. THOMPSON: And we're not talking about setting

aside particular grants of parole. We're not talking about even setting aside a practice about parole.

It's just a background fact about the law and about the world that informs the Court's review of the June 1 Memo.

THE COURT: Right.

MR. THOMPSON: And since none of the statutes prohibit review of the June 1 Memo, the statutes have no application in this case.

THE COURT: And in thinking about metaphors and analogy for this judicial review question and how this Court's review intersects with those statutory provisions on judicial review and *Trominksi*, I thought of a toll booth.

Let's say this is a toll-booth law. And there's an individual particularized assessment at that toll booth. The light turns green based on certain internal memoranda. The light turns red based on internal memoranda.

The Governments of Texas and Missouri are not asking this Court to adjudicate any of those individual particularized decision to turn the light green and allow the truck to pass or to drop the arm, turn the light red and to stop it, because there's an infrared scanning policy or something internal to the agency operation.

Instead, we're talking about the termination of a memorandum involving toll booths in a categorical sense and whether that is adjudicable in this court pursuant either to

the APA, the Take Care claim, or even the INA claim.

Do I understand the distinction? And I know you're not bound to use toll-booth analogies, but --

MR. THOMPSON: I think I can go --

THE COURT: -- have I correctly --

MR. THOMPSON: -- with toll booths.

THE COURT: Have I correctly understood the nature of the Texas and Missouri arguments against these judicial review tensions that inhere in the statutory text and also in the structure of our Constitution?

MR. THOMPSON: I think that's true. Now, I'll hazard an extension of the toll-booth --

THE COURT: Please do.

MR. THOMPSON: -- metaphor. So if there were a case about whether a driver were speeding, there might be a relevant fact of what time did he go past the toll booth and when did he enter this. And you might need to establish that the toll booth can turn from red to green, and it, in fact, did so on this date at this time.

Even if for some reason you weren't allowed to review anything about, you know, whether the light should have been green or red or anything like that, it could still establish the facts that showed when he entered, and that fact contributes to a finding that he was speeding.

THE COURT: Okay. I think I have your argument. I

do not bind the State of Texas, the State of Missouri or the United States of America to toll-booth metaphors. You do not need to follow that metaphor to every terminus.

(Laughter.)

THE COURT: So you may proceed with your next point.

MR. THOMPSON: Thank you, Your Honor. Very -- I have only just a couple of slides here. Our constitutional claim is under the Take Care Clause. This is, of course, a typo. It is not in Article III. Sorry about that. He shall take care that the laws be faithfully executed.

We could have endless scholarly debates about what the outer bounds are of the Take Care Clause, and many scholars do have those debates.

But what I think is indisputably not taking care that the laws be faithfully executed is taking affirmative action that systematically prevents the Executive Branch from complying with a statutory command.

As to the agreement, there's -- there's not much factual dispute here, Your Honor. The agreement requires that DHS consult with Texas, allow us the opportunity to comment on changes like this. It's very similar to a notice and comment regime under the APA.

And Defendants don't dispute that they didn't do that. Their defense is that the agreement is just per se

invalid. They say they didn't have authority to sign it.

In our view, DHS certainly did have authority to sign it. Not only did it represent it had that authority, of course, in the agreement, but Congress has authorized DHS to develop a process for receiving meaningful input from state and local governments to assist the development of the national strategy for combating terrorism and other Homeland Security activities. This is, of course, a Homeland Security activity, immigration enforcement.

And if the question is what did Congress have in mind for permissible processes for receiving meaningful input, I think a notice and comment-like regime must be, you know, the core of what's permitted, because that is what Congress has, in fact, compelled in some circumstances.

So with that, Your Honor, I will turn over the podium to Mr. Osete, who will address the third question, unless Your Honor has further questions.

THE COURT: One question. So we're now to Claim 4, which is what I have termed the agreement claim.

What is the limit of using agreements with notice and consultation-like clauses to slow incoming administrations?

For example, what if the agreement in this case required four years and one day instead of 180 days; is there an inherent reasonableness requirement that the Court should

infer in conducting that analysis?

MR. THOMPSON: I think that would be fair. I think it's fair to say that there is some things that the government simply could not agree to because it would violate either an explicit or an implicit --

THE COURT: It's kind of like when the Texas Supreme Court declares something void as against public policy, like, there would -- there would be instances where agreements were so beyond the pale that --

MR. THOMPSON: I think that's right. Now, the Texas Supreme Court also holds that public policy is declared by the legislature, so I think that in -- in this instance, to determine whether an agreement is, you know, so beyond the pale that it cannot be upheld would be a question of statutory interpretation. We'd be looking at the agency's powers. And then there would be -- of course, be a second back-end limit, I think, which would be -- if it were an agency action subject to APA review itself, you know, there could be a case about that.

There's not a case about that. No plaintiff has sued the federal government or Texas trying to set aside that agreement. The federal government has not, you know, raised a counterclaim or done any -- anything like that seeking relief to set aside the agreement.

I believe there might have been a footnote in their

brief, but it certainly wasn't developed enough for me to call it an argument that the -- that the Court should set aside the agreement on that ground.

THE COURT: As you might imagine, we did not find a lot of case law on the sorts of agreements deemed binding or not binding on subsequent administrations, especially where there's a change of political party.

So I would assume that at some point this Court and courts above this Court have got to infer some reasonableness requirement, whether it's under equitable authority or just in the separation of powers, but at some point these sorts of alleged binding agreements just would violate how succession of administrations is to occur.

MR. THOMPSON: I think that's right. Certainly an agreement could be arbitrary and capricious and could be reviewed as such. I don't think we're -- we're in that fact pattern.

We're talking about something very similar to how the APA works, right? So if Congress gets to decide kind of the public policy by analogy for this reasonableness inquiry, the fact that this is so similar to the APA is relevant. And the term is, of course, not four years; I believe it was up to 180 days in the agreement.

THE COURT: Right.

MR. THOMPSON: It's not uncommon for regulatory

processes to take longer than that. We are more than 180 days into the administration. We know there are various high-profile rulemakings the Biden Administration is pursuing that have not yet come to a conclusion.

So I don't think in our system, which includes the APA, there's any kind of implicit limit saying the government must be able to effectuate all of its changes within 180 days.

THE COURT: Okay.

MR. THOMPSON: And, of course, they may have been able to do it faster than 180 days if they'd have complied. It's just an outer limit. It's not a requirement that it last that long.

THE COURT: Yes. And I have the Government's argument. I think, of the four claims, this is the most theoretical. It's the most without analogue to previous agreements or cases, and so I didn't see the reasonableness sort of factor teased out by either party, but I do not understand the Governments of Texas or Missouri to argue that these are strictly enforced without any sort of outer bound for reasonableness.

MR. THOMPSON: That's right. We're not saying that every hypothetical agreement would certainly be valid. I think they have to be evaluated on a case-by-case basis.

THE COURT: Okay. I have your argument. I'll

allow the State of Missouri to proceed.

Mr. Osete, before -- as you approach, I'm going to consult with my clerks, and I will give you a time check so that you know what time is available.

MR. OSETE: Thank you, Your Honor.

(Court/law clerks sotto-voce conference.)

THE COURT: Okay. One day I'm going to buy a chess clock, and we'll just put it up there, and you'll be able to monitor this, but, right now, we're relying on staff. By our calculation, the States of Texas and Missouri have 35 minutes left, and, of course, you have held 30 minutes for rebuttal after the Defendants present their case-in-chief.

You may proceed.

PLAINTIFF MISSOURI CASE-IN-CHIEF

MR. OSETE: Yes, Your Honor. May it please the Court? And I will note that, unless the Court has extensive questions about remedies, I don't anticipate my presentation to go beyond 15 or 20 minutes. And Mr. Thompson will be handling the rebuttal aspect after the Government proceeds.

I will admit I haven't had the pleasure of arguing in the Fifth Circuit. I hope to one day, but I can say that, at the Eighth Circuit, and in particular Judge Stras, is not shy about interrupting me at oral argument, so I welcome the Court's colloquy in that respect.

Just as a threshold matter, I don't think I'm going

to have anything to add on standing. I thought Mr. Thompson did a very good job as an honorary Missourian today to represent our -- our standing in this case and the written submissions and evidence that we have submitted that supports that.

THE COURT: We're all about to be in the same SEC Conference together, so we might as well get --

(Laughter.)

THE COURT: We might as well get used to the pleasure of each other's company.

MR. OSETE: Sure. I think that -- I think that's right. And, of course, I would be remiss if I didn't say that we do believe that we have independent standing, independent from Texas.

That being said, if the Court believes that we do not, based on Judge Hanen's opinion last week, as long as one state has standing, we have standing as well. So unless the Court wants something else further on Missouri-specific standing, I'm happy to --

THE COURT: I'll deem --

MR. OSETE: -- address remedies.

THE COURT: I'll deem it incorporated by reference, and I'll deem it adequately briefed in the materials before the Court. And it would be cumulative at this point, so I'll allow you to incorporate those written and oral arguments by

reference.

You may proceed on what remains --

MR. OSETE: Sure.

THE COURT: -- for both Texas and Missouri.

MR. OSETE: That's correct. And, of course, Mr. Thompson can address anything else in rebuttal that I do not address, but I'm going to handle the remedies aspect.

So I think on the remedies one thing to start off with is, just to be very clear with the Court, as to the -- what the states believe is a warranted, a full remedy for these Plaintiffs in this case, and that is, if the Court concludes that the June 1 Memorandum is, in fact, unlawful, then under the APA, Section 702, it shall set it aside. That's the vacatur aspect of the remedy.

And we believe that's a warranted remedy here. It's the same remedy that Judge Hanen, for example, found last week in the DACA case. That's one aspect of it.

But, in addition to that, we believe in this context in this case an injunction is appropriate for many of the reasons that we submitted on the papers, and I will go through them right now. And I think -- I think the reason it's appropriate here, it really goes to the *Monsanto* case about whether or not an injunction is going to have, quote, "any meaningful practical effect independent of vacatur."

And I think based on the context of this case, as

Mr. Thompson said so vigorously about the resource constraints, the systematic violations of 1225 that we've alleged, we actually believe that an injunction for the government to implement MPP is a critical aspect of our relief.

So not only setting aside the June 1 Memorandum, but also insuring -- you know, unless -- unless the government decides to adopt a significant -- or enlarge their detention capacity and adopt significant measures to address these violations of 1225, we believe that, absent that, a full remedy here is both vacatur and injunction.

Judge Hanen also found those two remedies were appropriate last week. There are some distinctions.

But to be very clear, the Government has suggested that a mere remand is the warranted remedy here. We don't believe it is a full remedy here. Certainly an injunction in the DACA case and in the DAPA case and the 100-day pause case, a geographically-limited injunction wasn't enough. I don't see how a mere remand is enough.

And, of course, here one point I will make is that the memo itself in our view is -- substantively violates the APA, and it's not just insufficiently explained. The government has now had two opportunities to explain the termination of the June 1 Memo. There is a 700-page Administrative Record.

Again, we think that they didn't consider relevant factors like these perverse incentives to causing illegal -- illegal immigration, but we don't believe that a mere remand in and of itself is enough.

And if the Court were to conclude that a remand is warranted, it has to be a remand in addition to other relief, vacatur or some kind of injunction pending the remand for the government to address those issues.

But just to be clear, the States of Missouri and Texas are asking for vacatur and an injunction, and we believe that's consistent with *Monsanto*. And if I may --

THE COURT: So I understand that now. That was one of my questions, if Texas and Missouri perceive that there is a functional difference between the remedy provided by vacatur and what is requested in injunctive relief.

I'll now give you wide latitude to explain the latter. Explain to this Court what it should enjoin, how that is materially distinct and different from the relief you would receive through vacatur.

MR. OSETE: Sure.

THE COURT: So I don't mean to force you out of your outline or itinerary, but I'm interested in that --

MR. OSETE: Sure.

THE COURT: -- distinction, and then if you could just tell this Court what remains and what should be

enjoined.

MR. OSETE: So if the June 1 Memorandum is aside -- is set aside and we vacate it, we know that the January 20th Memo won't spring back to life. This Court has already concluded in its prior order that that's already expired by its own terms.

So it means that the program itself would be revived. It would be -- it would come back to life, if you will, but what's -- what's critical about that program and why an injunction we believe is appropriate is, without the government actually implementing that program, it's effectively a defunct program or a program that is a -- has been de facto terminated without the agency actually taking new agency action and actually taking steps to comply with the APA.

So, essentially, you have a program that's MPP, but without it actually being implementing and these folks who we believe should be sent to Mexico pending their removal proceedings, if that's not happening, then I think we're just right back at the same place, which is they've terminated it through the June 1 Memorandum.

Absent an injunction, I don't see what really causes them to implement the MPP program. They could just -- I mean, it exists, but if it's not implemented, we would submit that it's effectively a defunct program.

So we believe, for that reason, it's enough of a meaningful practical effect under *Monsanto* to warrant both vacatur and an injunction.

Now, just -- just in full candor to the Court, to the extent that that -- the Court sees no practical difference between those two, we're not saying that, you know, we won't be okay just with vacatur. Obviously, we're fine with just vacatur as well.

We're just saying that in this case we believe under *Monsanto* there is a meaningful practical effect to setting aside the June 1 Memorandum and ensuring that the systematic violations -- if they're not going to be detaining these folks, the systematic violations of 1225 are not happening; they are, in fact, complying with the program; and it's not essentially just a program on the -- on paper.

That's what I would submit as the meaningful practical effect. We think we satisfy *Monsanto* on that basis.

But, again, just to be clear, it's -- it's -- the first remedy that we ask for, if the Court does not believe that -- if the Court believes that vacatur in and of itself is enough, we have no -- no objection to proceeding with that. We just want -- we're just concerned that, because of these resource constraints that DHS has already put forward and Mr. Thompson has already explained much better than I

could, we are concerned that that is a problem we're going to run into again, and here we are, you know, six months from now trying to relitigate this.

So we think it's enough practical difference for that -- for that reason, Your Honor.

THE COURT: Okay. And there will come a point where I instruct the parties to submit proposed findings of facts and conclusions of law.

MR. OSETE: Sure.

THE COURT: And that order may also include proposed relief for particularized injunctive --

MR. OSETE: Sure.

THE COURT: -- language and relief. You have to realize I took Constitutional Law from Lino Graglia at the University of Texas. The assigned book was *Disaster By Decree*, and there are several horror stories about district judges managing school districts and --

MR. OSETE: Yeah.

THE COURT: -- ordering nat -- the construction of billion-dollar natatoriums, auditoriums, and planetariums.

MR. OSETE: Yeah.

THE COURT: I think that's a Kansas City case, so I am loathe to engage in that sort of micromanagement --

MR. OSETE: Right.

THE COURT: -- given separation of powers and how

the Article III Branch intersects with the Article II Branch.

So when we speak of injunctive relief, you can expect this Court to require guidance of both parties on the scope and how narrow or broad that should be.

MR. OSETE: Absolutely, Your Honor. And if I may just on that point, I think that's absolutely right; that *Missouri v. Jenkins*, and in particular Justice Thomas' concurrence in that case as well, has really provided a lot of guidance for the courts.

I will say that, in this case, part of the reason we think -- and, obviously, there's Fifth Circuit precedent that binds this Court, and there's Judge Tipton's opinion from earlier this spring, that in this context an injunction would be appropriate.

But I do want to highlight at the very least, aside from that binding precedent from the Fifth Circuit and Judge Tipton's persuasive opinion, you know, if you go back to Justice Thomas' concurrence in *Trump v. Hawaii*, I thought he made two very critical points there. The first point in terms of scope -- and to be clear, I'm not so sure that the Government is actually arguing that this injunction should somehow be, you know, limited by geography or geographical scope, but I -- I don't think they're making that argument, and I don't think they should be making that argument because Justice Thomas, who they extensively rely on in their papers,

rejected that the notion that an injunction that is broad in scope as a matter of geographical standpoint is invalid per se. I mean, he rejected that.

As long as it's providing full relief to the parties in the case, which we submit that is what we're asking for here, it doesn't matter whether it extends past Texas, past Missouri, past Arkansas, et cetera, and he's making that point.

So I think that's consistent with the Article III power. It's consistent with what he's written on this topic, which has been very extensive, along with Professor Bray. And -- but on top of that, I think he makes another critical point as to scope and what the appropriate remedy is, and that is --

THE COURT: I'm less -- I'm less concerned about geography and sort of the reach of the order. I'm more concerned about the particularity of ordering federal agents, agencies, Article II Executives to do X, like the sort of affirmative relief that is different in kind from mere vacatur of the memorandum and reinstating MPP, the sort of lengthy marching decrees and orders that you saw in some of those cases I referenced.

MR. OSETE: Sure.

THE COURT: What does Texas and Missouri require or request in injunctive relief and the language of that

injunction and its binding effect on the federal officers, you know, DHS, ICE, all of the different agencies? That's what I -- that's the portion of the analysis that I'm most --

MR. OSETE: Sure.

THE COURT: -- interested in.

MR. OSETE: And I think, of course, with our proposed findings and conclusions that we can get a lot more specific about it, but I think that the key point here is, when MPP was in effect and these individuals who presented themselves at the border for admission and were claiming asylum, there's a whole process about credible fear assessments and the interview process and all of that that happens.

But what's interesting about when MPP was in place —— and this is also in our record materials as well —— is, it's the -- MPP was the difference between 68,000 folks staying in Mexico and not being released in the United States and effectively none of them or a very small number of them actually staying here.

So in terms of language, it's following MPP. They can present themselves. If they do not pass a credible-fear test, that they do send them back to Mexico, which is what the program required.

And it's, again, trying to avoid these systematic violations of 1225 where they are letting these folks come

in; there are capacity restraints that do not allow them to be detained; and they then, you know, make their way across the country.

So I think a -- sort of a specific language, and, again, we can provide the Court with much more specific language to -- to that effect, but I think an injunction that ensures or at least requires them to implement this program, not just -- because that's the concern here is, they can have a program, but if it's not being implemented, I'm not so sure what the sort of practical -- I'm not sure we have a full remedy there, at least for us, because we get back to systematic violations of 1225. We get harms to the states.

So I think something to that effect, and we can certainly come up with something in our papers to submit to the Court, but I think that's the concern here, is, they can just go back to doing what they're doing. It's effectively a program on paper, and it doesn't get enforced, or it doesn't -- it's not implemented at all.

And I'm not -- none of us are suggesting that -- certainly not in our writings or here I'll tell you, I don't think any of us are suggesting that the Court adopt, you know, joint status reports or sort of update them like in the desegregation cases.

This is really just a full remedy -- like Justice Thomas said in *Trump v. Hawaii* in his concurring opinion, a

full remedy under the Article III power is to provide these Plaintiffs, not nonparties, but these Plaintiffs with a full remedy. And, as I stated earlier, based on the nature of this case, that is a full remedy.

The situation where -- or just because there is a sort of benefit that extends to nonparties, Justice Thomas himself rejected that as also being insufficient to not issue this remedy. The fact that there are other benefits to other nonparties, for example, beyond the Plaintiffs in and of itself is also not enough to -- to not exercise this extraordinary remedy.

So I think to that point, Your Honor, I -- this is exactly what Article III allows us to request. It alleviates our harms. It provides us with a specific remedy. And, in that case, again, we can come up with specific language as to what exactly injunction is, but that's the concern here is, it's just a program on paper if they don't implement it. At the very least they have a duty to avoid these statutory violations as Congress has laid them out in statutes.

THE COURT: I just -- you know, I would admonish both Texas and Missouri to appreciate that it is -- it's like the difference between a negative and a positive.

MR. OSETE: Sure.

THE COURT: It's easier to enjoin action and order that things be stopped than for the Court to make affirmative

decrees that things start or that certain facilities or detention --

MR. OSETE: Sure.

THE COURT: -- detention capacity be built and expanded. So it will be clear in the Court's order to both parties for submission of findings of fact and conclusions of law and potential injunctive language, but I would just ask that you be mindful of that.

MR. OSETE: Yes.

THE COURT: And I'll allow the parties to make their arguments on scope and the reach of any potential injunction, but I do instruct all of the parties to be mindful of that.

MR. OSETE: Yes.

THE COURT: I think some of those cases involving courts micromanaging things for decades are a cautionary tale and potentially run afoul of all sorts of separation of powers problems, so --

MR. OSETE: Absolutely.

THE COURT: -- I am looking at requested relief and eyeing the statutory language as well as the design of MPP. And so if anything requested is tailored to that, I'm more responsive -- I'm more amenable to those sorts of recommendations than ordering troops to cross borders and do things like that, so that's the tension; that's the concern.

MR. OSETE: Absolutely.

THE COURT: I know that you're appreciative of that, and you may -- you may proceed with any remedies --

MR. OSETE: Sure. And just on that --

THE COURT: -- analysis.

MR. OSETE: Yes. Just on that final point, just one more point on that, yes, anything we come up with would be consistent with *Missouri v. Jenkins*, with what Justice Thomas has written on this topic, and, for that matter, will be consistent with what these prior judges have already done in this context as well, Judge Hanen, Judge Smith in the DAPA case, and Judge Tipton as well just this past spring.

We are mindful of that, and we are as well going to consider that as we -- as we propose specific relief to the Court as it relates to an injunction.

And I guess the last thing I'll close with just kind of running quickly through these factors —— I'm mindful of the Court's time —— is the *eBay* factors that Judge Hanen analyzed last week. Irreparable harm, public interest, and balancing of the equities.

I submit that the balancing test and the public interest tend to merge together, so I'll run quickly just through irreparable harm. I think, like Judge Hanen, really as long as the states have standing, and here we do because we have costs that we cannot recover from the federal

government, there's ongoing irreparable harm here. I think we've established irreparable harm in that aspect, and I think Judge Hanen's analysis provides the Court with guidance in that respect.

I think in terms of the public interest, to be quite -- the primary one I would say is that the enforcement of federal statutes that Defendants are violating is a public interest. It's ensuring that the laws that Congress has written are, in fact, enforced. And I think that's a public interest. Justice Thomas has also weighed in on that as a public interest as well, and we've submitted that in our papers.

In this context, the public interest will be served by restoring integrity to the immigration system, as Mr. Thompson said earlier, avoiding these free tickets into the United States, and ensuring that our immigration laws are -- are followed, that Congress' laws as written are followed, and, more importantly, that the immigration laws -- that folks aren't gaming the immigration system, and that in and of itself as well is a public interest.

The other public interest that we have put forward through our evidence as well is the fact that you have the ongoing victimization of these migrants in our borders. An egg farm in Chicago, tomato farm in Florida, you know, a blue grove in Michigan, blueberry grove in Michigan. In Missouri,

in Springfield, in Branson and other places, these migrants are being victimized.

We've stated the labor trafficking. We've stated the sex trafficking. We've stated the abuse. The fact that they're not reporting these things. They don't think they're victims for that matter, because they are brought into the country through these perverse incentives, and they don't think they're victims. They're not -- they're not -- they don't see themselves as victims. They just see this as a run-of-the-mill thing.

And that too is in the public interest to avoid that victimization of the migrants, and that is another reason why we believe that injunctive relief would be proper in this case, considering those public interest factors.

The only thing I'll comment in terms of the balancing, I think the equities do favor us in this case. I will note that the Government made a contention at one point on the -- on the public interest of the balancing side -- I'll put it this way, the government has no interest in enforcing an unlawful memorandum.

Congress' laws as written must be enforced, and that's a public interest that outweighs whatever legitimate interest the government has in implementing an unlawful memorandum or violating the law, essentially with 1225, so we don't think that's enough.

I've only really identified one consideration that the Government has put forward, and I believe they submitted some affidavits from some State Department officials to this effect, and it's really this notion that, if you -- if you terminate MPP and you issue an injunction here, it's going to be disruptive with diplomatic relationships with Mexico.

And we've submitted extensive cases, and the one case that I will point out for the Court is the *TikTok* case, which I don't think I need to put the citation of that one, but it's *TikTok v. Trump* from the District of -- District of Columbia District Court, and that's one also where there were these issues of foreign policy and injunction, you know, would be affecting national security interest.

And I think Judge Randolph in that case still found that an injunction was proper particularly as it relates to enforcing the law as written.

You know, these sort of diplomatic concerns, I'm not trying to dismiss them, but at the end of the day, we are a sovereign nation. We have laws on the books that we need to enforce.

I will submit that MPP started off as a matter of U.S. policy and U.S. law, and eventually, you know, Mexico was brought into it in the summer of 2019 to sort of say, hey, we're going to -- we're going to send these migrants to Mexico; is that okay. And we -- we did cooperate with them,

and it was all great, but we still have an interest here in ensuring that our laws are enforced, our sovereignty as a nation is upheld, and that's exactly what the history of our country and the text of these statutes show.

And I would also note just from a technical standpoint, it's my understanding under the APA there is a foreign policy and military affairs exception. This is in our brief. But I believe it relates as to the notice and comment requirements for the APA. As Your Honor is well aware, we're not asserting a procedural APA violation here. It's purely substantive.

So I suppose going back to some of the -- the canons that you mentioned earlier with Justice Scalia, you know, Congress did not preclude an injunction in this context when it came to the substantive violations. It did so for procedural violations but not for substantive, and I think any foreign policy concerns would fit within that exception, but they're clearly not at issue here.

So I think for all of those reasons, we believe looking at the *eBay* factors, just as much as Judge Hanen did last week, a vacatur of the June 1 Memorandum and a permanent injunction are a full -- they are full remedies in this case for these Plaintiffs.

And for those reasons, Your Honor, and for the reasons that we've submitted in the papers, we ask that Your

Honor award that relief to these states. And I'm happy to field any questions if Your Honor has any.

THE COURT: I don't mean to bombard you with all of the remedies questions.

MR. OSETE: Sure.

THE COURT: Which is really where the rubber meets the road --

MR. OSETE: Sure.

THE COURT: -- as the Court is looking forward to fashioning orders and the rest.

I know Mr. Thompson did an admirable job of walking through the claims. It just happens that we're at the remedies' portion of the States' presentation, so I'm not throwing fastballs and chin music just because it's Missouri and not Texas.

MR. OSETE: Absolutely.

THE COURT: So two follow-up questions on remedies. Will an injunction -- and it really -- it really dovetails your last point about foreign relations and what happens at the water's edge and how the Court should look to those arguments by the Government.

If the injunctive relief includes a requirement to increase detention capacity, which may affect facilities on either side of the border, does that -- how does that -- how do the states respond to the foreign relation arguments

presented by the Government, that that sort of injunctive relief sort of violates the Article II Branch and the Executive's prerogative to sort of speak with one voice on foreign relations and diplomatic relations?

MR. OSETE: Well, so on the -- we don't believe we are depriving the government from speaking with one voice on diplomatic efforts. I would actually view it or I would submit that what the states are asking the Court to do here is ensure that the systematic violations of a co-equal branch of government in this country that they are not being violated; that they're actually being enforced.

To the extent there's some spillover effect into the Executive's power to speak as the Executive with foreign nations, again, I will -- I will say that MPP started off as a U.S. policy, U.S. law. It's been on the books for a long time, at least the contiguous territory aspect has been on the books for a long time. It has been exercised in the past with Mexico with and without their consent.

And so the notion that somehow this is going to categorically affect those relationships, I just don't find that very plausible, particularly in light of the history and in light of the practice of this actual program being implemented.

And, again, if that were -- if that were a problem, I suspect it would be something that Congress could have

written into the statutes, could have actually addressed directly, but other than that, Your Honor, I -- I don't think there are any -- there's not a lot of --

THE COURT: This is -- this is intrinsic to immigration as it intersects with a bordering nation. This is resolved at least at the constitutional level in the Article I plenary power that's reserved to Congress.

MR. OSETE: Uh-huh.

THE COURT: This is not the States of Texas or Missouri interfering with the President's ability to serve as chief diplomat in treaties or --

MR. OSETE: Sure.

THE COURT: -- to intersect with the Senate or any of those functions here.

This is just really intrinsic to some of the effects of immigration policy, and it's just intrinsic to Texas/Mexico relations and the border there.

This is not -- this Court doesn't need to do a deep dive into all the cases that deal with the Chief Executive's prerogative to be the voice of the United States when working abroad.

MR. OSETE: I don't think so. And, in fact, in the meantime, you know, the Executive is, in fact, as the Government -- I'll let the Government speak for themselves on this, but there are still efforts between the two countries

to talk about how to address, you know, this migrant crisis.

It's on the record, but I believe Vice President Harris -- while this litigation was pending, there was a national human-trafficking task force set up. They understand what these issues are, and I don't think we're -- we're not saying that they are somehow precluded from speaking with one voice. They can speak.

All we're ensuring is, as states, as the Founders' role for the states and for Congress' ability to pass laws and for them to be enforced, that's what we're focusing on here. We're not trying to take away the Executive's power under Article II to exercise these sort of functions.

We're just simply asking that, as a sovereign nation with our laws, that they be enforced, especially when they are mandatory, which we submit in this case, and I just don't believe that any of those considerations are really at play here.

THE COURT: I understand. I understand the arguments of Texas and Missouri as well. There are a lot of *Texas versus United States* cases where we get into Hague Conventions and other things like that. I --

MR. OSETE: Sure.

THE COURT: I wanted to make certain that it is not -- it is not the argument of either Missouri or Texas that this Court really needs to engage that jurisprudence.

Now, the last question on remedies.

MR. OSETE: Sure.

THE COURT: So as I have labeled the claims —— and I think this is consistent with Mr. Thompson's presentation —— Claim 1 is the APA claim, arbitrary and capricious. Claim 2 is the INA claim.

MR. OSETE: Uh-huh.

THE COURT: That's Section 1225. Claim 3 is the Take Care Clause claim. That's the constitutional claim.

MR. OSETE: Uh-huh.

THE COURT: And then Claim 4 is what I call the contract claim, the agreement claim.

MR. OSETE: Uh-huh.

THE COURT: So in looking forward to fashioning potential relief, if the Court grants -- and, you know, there's no rule of orderliness among district judges here, but I do read other opinions and what has happened in similar litigation.

MR. OSETE: Sure.

THE COURT: If the Court grants the Plaintiffs' APA claim and does vacate the June 1 Memorandum, is there a need to rule on the statutory or constitutional claims?

I understand your argument on the necessity of injunctive relief --

MR. OSETE: Uh-huh.

THE COURT: -- but is there a case from Texas or Missouri that this Court necessarily need reach the statutory and constitutional claim if it determines you have prevailed on your APA claim?

MR. OSETE: In full candor, Your Honor, in terms of a direct case that I can give you right now, I don't have one in particular.

I think what I can say and why I think that perhaps the -- I understand that the Doctrine of Constitutional Avoidance, the Court, you know, should try to avoid these constitutional questions if it can address it on nonconstitutional grounds. And, again, I understand that's a doctrine, and the Court is free to do that.

I will say for this -- for this particular context and for this case, the reason I think -- and certainly I'm -- if Mr. Thompson has anything else to add in rebuttal, he can address it, but I think in this context the reason why the 1225 claim perhaps goes along with the APA claim and the Take Care Clause claim is that the 1225 claim is really the obligation for them to set up this mandatory detention program. And they're not complying with that.

And we're alleging that an injunction would certainly help trying to avoid these systematic violations of 1225. So I think, for that reason, even if the June 1 Memorandum is set aside, you get back into the situation

where you still have a program. Let's say -- and, again, I don't want to speak for the government, but assuming the government does not actually implement MPP if it does spring back to life, then what do you do about the systematic violations?

And I'm -- we're just concerned that those violations could still occur. And so to the extent the Court concludes that there is, in fact, a duty, there are, in fact, systematic violations, it's just -- for importing context, I think the 1225 claim goes hand in hand with the APA claim. And that's what I would say to that.

Again, on the constitutional claim, I submit that if Your Honor rules in our favor on the APA claim and the 1225 claim, it doesn't necessarily need to rule on the Take Care Clause claim.

With that being said, I think if Your Honor does find merit to our Take Care Clause claim, then I think that only strengthens the need for an injunction, but it also perhaps diminishes the Government's request for a mere remand.

And so for those reasons, I -- we believe, or at least certainly the State of Missouri, and Mr. Thompson can speak otherwise if he disagrees, but we submit that the Court can and should reach those other claims as well.

THE COURT: Okay. I have your argument, the

arguments of Texas and Missouri. I remind everyone that those states have reserved 30 minutes for rebuttal.

At this point, we will take our lunch break, and because we have out-of-towners present from D.C., Missouri, and Austin, I don't want to deprive you of the marvelous beef options that are available in Amarillo. Most of the beef that you eat probably started here at some point.

So I'm going to give the parties until 1:30. So I'll instruct both the Plaintiffs and Defendants to arrive back at this court at 1:30.

We will then begin with the Defendants' case-in-chief. And if there are any technical questions that you need resolved regarding your presentation, I would just refer those to my courtroom deputy. So if you need access to the ELMO, to the projector, to the screen, anything like that, this is a good time to resolve some of those technical questions. I would just direct you to my courtroom deputy.

So, at this time, the Court stands in recess. The parties, counsel are instructed to re-arrive at 1:30.

MR. OSETE: Thank you, Your Honor.

COURT SECURITY OFFICER: All rise.

(Lunch recess.)

COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated. The Court is back on the record in the State of Texas and Missouri versus

President Joseph R. Biden, et al, Civil Action No. 2:21-CV-067.

At this point, I'll invite the United States as Defendants to present their case-in-chief. You may do so from the podium.

DEFENDANTS UNITED STATES CASE-IN-CHIEF

MR. WARD: Thank you, Your Honor. Brian Ward on behalf of Defendants.

Your Honor, the Court should reject Plaintiffs' attempt here to restrict the authority and discretion of the federal government and the Executive Branch to make decisions about how to best manage the border, how to best enforce our immigration laws, and how to engage in foreign affairs, including negotiations that are well underway with Mexico and other foreign countries about other broader initiatives that the current administration believes will better and more sustainably manage migration, reduce the strain on the border, and address some of the goals that were initially set out in MPP in better and more sustainable ways than that program was able to do.

Now, both the Supreme Court and Congress have recognized that the Executive Branch has broad discretion in this area. So the Supreme Court said in the *Arizona* case that broad discretion of immigration officials is a principal feature of the immigration system, and the Supreme Court in

other cases have repeatedly said that that discretion extends to Executive Branch, Department of Homeland Security choices about what type of proceedings to place individuals in and what type of proceedings authorized under the statute to prioritize in carrying out their view about how to best enforce the immigration laws.

And Congress has similarly indicated that the Executive Branch has broad authority in this area, both in Section 1225(b)(2)(C) -- that's the provision of the INA that authorizes the Department of Homeland Security to return an individual temporarily to Mexico while their removal proceedings are ongoing. That provision provides authority for DHS to use that authority, but it sets no standard; it has no mandatory language. Nothing in that provision requires the agency to use that in any set of circumstances.

There's also a number of other provisions within the INA that are aimed at protecting the Executive's discretion over choices about what type of procedures to use. Most of those are contained in 8 U.S.C. Section 1225.

We can talk about those a little bit more later, but these are provisions that Justice Scalia said in his opinion in *Arab-American Anti-Discrimination League v. Reno*, these are provisions of the INA that Congress specifically aimed at protecting the discretion of executive agencies in making choices with respect to immigration and protecting

them from precisely the type of lawsuit that the Plaintiffs seek to bring here to restrain the authority of the Executive in this area.

Now, this broad discretion of the Executive and of DHS in the area of immigration prevents Plaintiffs from being able to succeed on any of their claims on the merits, even if the Court could reach the merits of those claims, but there's also a number of barriers to Plaintiffs being able to even bring suit here.

And the first of which, which is the first -- the first issue that Plaintiffs addressed as well, is that they lack standing to put forth any of the claims they seek to advance here.

Now, this case is not no longer at a preliminary stage. It's not a preliminary injunction case anymore. It's not a case like some of the other *Texas* decisions that have been discussed so far today that was decided at the preliminary injunction or motion to dismiss cage -- stage. We're now resolving this case on the merits.

So as the Supreme Court set out in the *Lujan* decision, it's not enough at this stage for them to put forth plausible allegations of injury or harm, and since this whole case is being resolved on the merits at this point, there's not some subsequent trial where in some circumstances at summary judgment it might be enough to raise facts that

create a disputed issue of fact for trial.

At this stage, Plaintiffs actually have to put forth evidence that establishes every element of standing, including injury-in-fact, and tracing that injury to the challenged action here. They have to show that the injury that they have proven relates directly to the termination of MPP, and they can't do that here. None of their evidence shows that the termination of MPP has led to a concrete particular injury for either of the states.

Their allegations are essentially that Texas is a border state, and that a certain number of individuals, if allowed into the United States, will either end up in Texas or will travel to Missouri, and that additional individuals within those states will impose costs on the states in terms of the services they provide.

Well, that's precisely the theory of standing that the Fifth Circuit rejected in the *Crane* case. And the *Crane* case, this is the 2015 decision, the same year as the decision in the DAPA case, but the 2015 decision addressing deferred action.

And, in that case, the State of Mississippi brought a claim, and they put forth evidence and argued that illegal immigration was costing the State of Mississippi 25 million dollars a year. There was evidence in the record. They put forth a study. And they allege that illegal -- because

illegal immigration was causing this impact or increased cost to the states, that they had standing to challenge DACA.

What the Fifth Circuit said is that, generalized information showing illegal immigration is costing the state money is insufficient to confer standing. What you need is concrete evidence that state costs had increased or will increase as a result of a particular action. Otherwise, the traceability argument is purely speculative.

And that's what we have here. Similarly, the states here are arguing that, if there are -- if there is an increase in individuals in the states, that will lead to increased costs, but they've pointed to nothing that shows in particular that terminating MPP will necessarily lead to any increased costs for these states.

And, again, as we set out in our briefing and as is shown in the record, the number of individuals enrolled in MPP began declining some -- at some point in 2020, so we're well -- we're a year past that point now. New enrollments in MPP were suspended in January of 2021.

Plaintiffs filed this suit four months after that, and we're now a bit after that as well. And even though we're well past the point in which a large number of individuals were being regularly enrolled in MPP, they've pointed to no particular evidence that shows there has been an increase in state costs or even an increase in individuals

in the states as a result of the termination of MPP.

The Supreme Court just rejected a similar argument on standing in the Affordable Care Act case, *California v. Texas*, just this term in which the Supreme Court said that the states lack standing because, even if they could show an injury —— and their alleged injury there was increase in healthcare costs —— they hadn't shown that it was tied or traceable to the particular provision of the law that they were challenging, and because they couldn't tie those things together, they hadn't satisfied their burden to establish standing.

And, again, those cases, unlike this one, were cases decided -- *Crane* was a case decided at the motion to dismiss stage, where a lower standard of evidence might be sufficient, where plausible allegations of injury, harm, traceability might be enough, and still the courts found insufficient evidence of standing.

Here, we're resolving this case on the merits, and so Plaintiffs have to meet a higher standard in order to establish standing.

A couple of other just points on traceability, as my co-counsel noted earlier, some of their evidence relates to allegations that terminating MPP will lead to an increase in the number of unaccompanied children that are in the states. As he noted, MPP didn't apply to unaccompanied

children, so whether MPP is in place or not has no effect or bearing on whether -- on the number of unaccompanied children that are in the states.

MPP also didn't apply to individuals from Mexico. It only applied to individuals that were transiting through Mexico to the southern border from other places. I think the determination was made that, if individuals are from Mexico and are claiming they have a fear of being in Mexico, that we shouldn't return them to Mexico while awaiting that claim. It's only if their fear isn't in Mexico; it's from other places.

And so while Plaintiffs put forth allegations that there's been a -- terminating MPP might lead to an increase in individuals arriving at the border or some sort of surge in immigration, they haven't identified where those individuals are from.

And, in fact, the evidence they cite in their Appendix that they refer to as saying 56 out of every 1,000 unauthorized immigrants in the country end up in Missouri, that evidence shows -- specifically, if you look at it, it shows the majority of individuals in Texas and Missouri who are here without authorization come from Mexico. And so those are individuals that wouldn't be amenable or couldn't be returned to Mexico under MPP anyway. That undermines their traceability argument.

Another point that undermines their -- their argument of standing or injury that is traced to the termination of MPP is that MPP didn't actually require anyone to be returned to Mexico. It's a point I take Plaintiffs not to dispute, is that, even when MPP was in place, it didn't require every individual that was potentially eligible to be returned under it.

MPP left discretion to individual immigration officials at the border to first determine whether an individual was eligible to be placed in MPP, but then also had the discretion not to place that individual in MPP. So it's not clear that, even if MPP was in place, that any individuals will necessarily be returned to Mexico under that policy.

So that undermines their theory of traceability, but also any argument on redressability. If their harm is tied to the idea that having MPP back in place will prevent individuals from being present in these states, since MPP didn't require any individuals actually to be returned to Mexico, setting aside the memorandum terminating MPP won't necessarily decrease that.

The same is true of the evidence related to whether the presence of MPP deterred individuals from coming to the border. The evidence in the record shows that, in the months after MPP was announced in December of 2018, there was a

sharp spike in the number of individuals arriving at the southern border. January, February, March of 2019, the first three months that MPP was in place, arrivals at the southern -- encounters at the southern border increased substantially.

So that undercuts their argument that the announcement of MPP or the termination of MPP will necessarily have a direct impact on the number of individuals arriving in the United States. And that's what the cases say as well; that the decision to leave another country and come to the United States depends on a range of factors that individuals might consider, and tying that to any particular announcement one way or the other on immigration policy of the current administration requires -- is just pure speculation.

One final point on redressability, in order for MPP to operate in the way that I think the states hope it will if it was reinstated, individuals have to be returned to Mexico. That's not something that the United States can do unilaterally. In order to have MPP function properly, there would have to be negotiations with the Government of Mexico and agreement that they would take individuals returned under MPP from the United States, agree that we can send those people back to Mexico. The United States doesn't have authority to take anyone out of the United States and send

them to Mexico without Mexico's specific agreement to take those individuals in.

So any order that MPP be reinstated wouldn't -- wouldn't redress their alleged harm, because it would essentially be unenforceable. It would require the government to take substantial steps and refocus negotiations with other countries, particularly Mexico, about what the current administration wants to do in terms of its immigration enforcement priorities and its initiatives for managing regional migration and get Mexico to re-agree both to take the individuals and to the other agreements that were in place that made MPP -- that were intended to make MPP work, and that Mexico would have to agree to provide these people some sort of temporary status and help protect them and support them while they were waiting in Mexico, so they could be able to attend their hearings in the United States.

Just one point on the 2015 decision, *Texas v. United States* decision, the DAPA decision, that was a case in which I think is distinguishable from this one. Again, there you had a clear injury. The Court there found that, as a result of the DAPA policy, there would be 500,000 individuals in the State of Texas that would acquire lawful status, and that DAPA would be the sole and direct cause of them having the lawful status within the state.

There's no such evidence like that here, that

there's this large number of individuals, and certainly no evidence or argument that MPP does anything to provide individuals with some sort of lawful status within the United States. So, here, we have much -- much less of a tie between the actual policy and the number of individuals that would be present in the state, and also just no evidence that additional evidence -- individuals would be present in the state.

And the Fifth Circuit's decision in that case was based on a finding that it would -- having that many individuals within the state who would not only be allowed to obtain driver's license but would be encouraged to do so under the DAPA policy, that that would be a -- directly cause a substantial increase in the costs to the state.

The Fifth Circuit said there that it's not enough to put forth allegations that show maybe a few asylum seekers would show up in the state. You need the type of dramatic increase in costs that Texas had shown there that would cause them to have to get more building space, hire more individuals, buy office equipment, things of that nature. They called it a dramatic increase in costs in millions of dollars. It was not incidental or attenuated, but was a direct cause of the DAPA policy being in place.

So substantially different than what we have here, where MPP or its termination doesn't affect the lawful status

of any individuals within the United States and does not -- there's no evidence in the record that shows that there have been a substantial increase in costs.

And, again, the DAPA case, unlike this one, was a case involving a preliminary injunction, so in early stage of the case in which plausible allegations of standing might be sufficient, and, there, there was obviously more evidence than here, but on a lower standard than --

THE COURT: And this is *Texas versus United States*, the Fifth Circuit 2015 opinion? I know we have about six or seven versions of *Texas versus United States*. This is 809 F.3d 134 where the Court uses the language "dramatic increase?"

MR. WARD: Yes, Your Honor.

THE COURT: Okay. All right. I just want to make sure I'm tracking with the right *Texas versus United States*. You may proceed.

MR. WARD: Yes, Your Honor. And then just one other point on standing, standing in that case, that *Texas* case, was based on a determination of special solicitude with respect to the states that we think does not apply here. As the Court said in that case, that what you need in order to apply the Supreme Court's law on special solicitude is you need some sort of procedural right or indication in the statute that Congress intended to create a procedural right

for the individuals to sue, or states to be able to sue.

Plaintiffs here haven't pointed to any sort of procedural right like that.

The Fifth Circuit in *Texas* applied sort of a looser analysis to the procedural right that's required in that case, because they distinguished DACA and DAPA as not just a nonenforcement policy but also as a policy that provided affirmative benefits, provided lawful status within the United States.

And they said that distinguished it from situations in which an agency just makes a decision to -- a prosecutorial discretion decision or a nonenforcement decision to prioritize one aspect of a statute versus another. There, the stat -- there, the program provided affirmative status and benefits to individuals, which distinguished it from prior cases where they had found no standing to sue.

If the Court -- if the Court has any other questions on standing, I can move on to other topics.

THE COURT: Okay. So to your point on the particularity of the data marshaled by the States of Missouri and Texas, I've already asked multiple questions of those states regarding the sorts of numbers necessary to tip the scales to satisfy the standards set forth by the Supreme Court and the Fifth Circuit.

What is the government's detention capacity? So I see a lot of briefing about the surge of persons, how, you know, even things like the pandemic and political environments of host countries have overwhelmed federal resources for various reasons.

Has the United States ascertained even an approximated detention capacity in real numbers? So if I'm going to require particularity of the States of Texas and Mexico [*sic*], what is -- what's the baseline that I can compare that to? What is the detention capacity as the United States understands it?

MR. WARD: I don't know the answer to that, Your Honor. It's possible that the Department of Homeland Security has an understanding or a baseline of its overall detention capacity, but that's -- I'm not aware of what that number is.

THE COURT: And, you know, given the voluminous records that have been supplied both by the United States in support of its defense of the APA claim and by the States of Texas and Missouri in response, is there any disaggregation of that data that would reflect the number of aliens detained versus paroled? Has that been disaggregated anywhere in the record for the Court's reference?

Since MPP specifically deals with that parolee category of persons, is there -- is that reduced to absolute

number or even approximate number?

MR. WARD: Not in the record, Your Honor.

THE COURT: Okay.

MR. WARD: I'm not aware of any particular numbers. And, again, the MPP policy or the termination of the policy doesn't say anything in particular about parole. It doesn't -- it doesn't provide any benefits or any determination or even any guidance to the agency on how it should or should not use parole.

And so the record -- the record doesn't contain any information about detention capacity or numbers of individuals versus detained versus paroled. It's possible, again, that the Department of Homeland Security has that information, but it's not, as far as I'm aware, in the record.

THE COURT: Okay. So -- and I understand, and I have the Government's argument on the stressed resources, you know, in some of the affected border regions and even into the interior.

As a categorical question, is it the position of the United States that the government does or does not have the capacity to detain or expel every illegal alien required by 1225, subject to the government's discretionary authority to parole?

Like, are you able to ascertain if this is a

temporary surge, but the government otherwise has capacity, or, instead, that it is the position of the United States that they just do not have capacity for the numbers involved?

MR. WARD: I don't know the answer to that definitively, Your Honor.

I believe that there is -- there are times in which there are surges which go beyond the capacity of the government to detain individuals or detain individuals in a particular region. There obviously is parole authority in those circumstances.

And there's some indication, as set out in the Secretary's memo, that it's been an unusual time, in that, with the coronavirus and individuals being on the other side of the border for a substantial amount of time, even when they were in MPP, that there's some effort to deal with this surge or pent-up group of individuals.

So that could indicate a temporary surge, which might place an additional burden on the detention ability of the government, but -- so I -- I think it's possible that there is -- there is surges that affect the ability of the government to detain everyone in certain circumstances, but I wouldn't -- I don't have a definitive answer that that's currently the case.

THE COURT: So neither -- I've neither heard from the Plaintiff -- I should say I've -- I've heard neither from

the Plaintiffs nor the Defendants absolute numbers on capacity and how far above capacity we are.

At this point, the Court, when doing the particularity analysis and the standing analysis, is dealing with approximated numbers, estimates, allegations of extraordinary surge numbers, but I'm not going to be able to sort of define the denominator in absolute end terms either way, as to capacity or the excess.

Is that your understanding of the record? We're just dealing with approximations start to finish.

MR. WARD: In terms of that question, yes, Your Honor, I think that's correct; that the record, as constituted, doesn't answer that question.

THE COURT: Okay. And did the Secretary consider -- as you understand the record, did the Secretary consider the possible shortage of detention capacity when he terminated MPP? What does the record reflect on that?

MR. WARD: Yes, Your Honor. So the Secretary says in his memo that --

THE COURT: And if you could give me a record cite. Understanding that there are pending objections and responses subject to adjudication at this point, you can refer to anything that's before the Court. I'll make those determinations before issuing the final ruling. But is there a particular record cite?

MR. WARD: Yes, Your Honor. It's in the memo itself, so the memo is at record cites 1 through 7. So, in the record -- in the memo itself, the Secretary says, the administration has been and will continue to be unambiguous that the immigration laws will be enforced, and has various tools at its disposal to do that, including detention and various alternatives to detention, and case management programs that have shown to be successful.

So the Secretary said in the memo that he was considering the various other options that the INA provides the Secretary in order to deal with individuals coming into the United States.

I don't have the record cites in front of me, but there are in the record things that he referred to related to other support programs and alternatives to detention that the agency uses to ensure individuals show up for their proceedings, other initiatives that the agency is taking including dedicated docket in immigration court for individuals arriving at the southern border to ensure that, if those individuals are brought into the United States, whether detained or not, that those proceedings can be expedited so that these aren't individuals being in the United States for a long length of time.

THE COURT: Okay. And I believe the Bates labels range is in the Administrative Record AR001 through AR007.

This is relevant both to the Plaintiffs' claim on APA, arbitrary and capricious, and then also particularity of the data regarding the harm or loss alleged by Plaintiffs.

So the Government agrees that this document on the termination of the Migrant Protection Protocols program is relevant as an admission by the Government on the effect of MPP at least when aligned alongside other various alternatives?

MR. WARD: Yes, Your Honor. That document represents the Secretary's view on MPP's effectiveness.

THE COURT: Okay. All right. You may proceed. I think -- I think that is the only question I have regarding standing.

I know we're -- both parties are being considerate in following sort of the order laid out in the posed questions, so the --

There's one other question on causation. So it's not expressly a factor, but it does relate to some of the factors that the Court must consider on standing.

Regarding cause, and traceability specifically, what is the United States' position on whether MPP caused the government to parole more illegal aliens than it would have if MPP were still in effect?

So, again, I understand I asked earlier if there had been a disaggregation of parolees versus people who had

simply evaded detection, and it doesn't seem like that disaggregation in that particularity is available in the record yet.

But regarding the losses alleged in the various different categories set forth by Texas and Missouri, does the Government have a position on whether the MPP caused the government to parole more illegal aliens than it would have had MPP remained in effect?

MR. WARD: I think the Government's position is that that has not been established one way or the other by the record presented in this case or the evidence in the record.

Again, it's -- even if there are additional individuals, it's not clear that anyone would necessarily -- even if there are additional individuals arriving at the southern border or who are being brought into the United States, whether detained or otherwise, it's not clear that MPP is the driver of that or would necessarily affect that.

So, again, for instance, if there's a surge, and that surge involves Mexican nationals, again, the individuals who are the majority of the individuals --

THE COURT: And MPP doesn't affect them?

MR. WARD: It doesn't apply them. The same --

THE COURT: I have the Government --

MR. WARD: -- thing with --

THE COURT: I have the Government's argument on that, and I understand, you know, the Government's position that immigration patterns and alleged surge data is a multivariable prong such that the Government -- such that the Governments of Texas and Missouri can't just point to MPP as sort of the dispositive decisive event.

But does the United States take a position on whether it would be paroling the same number of illegal aliens if MPP were an option still in place?

MR. WARD: I don't know the answer to that, Your Honor.

THE COURT: Okay. I was searching the memo -- you know, the various memoranda in this case, and I couldn't ascertain if there was a definitive decision on that, and I think it may be a function of the data set. We just don't have the hard, concrete data on parolees versus the various different categories at this point.

But the United States does not take a position on whether it would be paroling the same number of illegal aliens if MPP were still an option for those illegal immigrants who hail from Honduras, Guatemala, and El Salvador?

MR. WARD: It's possible, Your Honor. I can't take a definitive position on that. I just don't know, and the record doesn't establish it.

Again, the Secretary's view is that, in order to -- and this is set out in the memorandum again, in order to manage regional migration and address individuals arriving at the southern border, that efforts to prevent surges and to manage that need to start well before individuals arrive at the border.

And so there are ongoing negotiations about -- with other foreign countries, Mexico, and the Northern Triangle countries, on initiatives that the current administration thinks will get -- better get at the root causes of immigration and reduce overall the number of individuals. So I think the hope is that overall they'll be -- the individuals that arrive in the United States will have -- there will be fewer of those; we'll have better capacity to manage those. There won't be surges in the same way if the current administration is successful.

And there's already -- I think this is set out in our declarations and in our Appendix, there's already been efforts to get Mexico to, instead of supporting these camps that have sprung up on -- on just the Mexican side of the southern border, is to work on intercepting and working with individuals who are fleeing -- fleeing their countries further down in Mexico, and to address -- address this problem where it starts in the Northern Triangle countries by working with those governments through other initiatives.

So I think the hope is that it will address this problem more broadly and at its source, but the record doesn't -- again, it's a little bit hypothetical about what would be happening if MPP was in place; we can't say for sure. But the record -- the evidence in the record doesn't -- I don't think resolves that question one way or the other.

THE COURT: As we're trying to ascertain standing in this case, you're using the loss amounts, and Mr. Thompson, during his presentation, he had several categories that have sufficed to find standing in other immigration cases.

The consistent theme is that we're looking for a delta that might reflect the injury-in-fact suffered by Missouri and by Texas. There is data that does reflect a current increase in parolees.

And does the Government for the United States have an explanation for the data that does reflect an increase in the number of parolees since the suspension of MPP?

So I understand that there are other variables, and I have the Government's argument that it shouldn't just turn on one dispositive parolee category that immigration surges and numbers and the stress on the federal government's resources is a multivariable project, but as to the increase in parolees, does the Government have an explanation for that

and how it correlates to MPP?

MR. WARD: I don't know that the record nec -- I'd agree that the record establishes that there's necessarily been an increase in MPP, but, yes, Your Honor, the Government's position is that that's not traceable to MPP.

THE COURT: Okay. So that's a traceability argument from the Defense perspective?

MR. WARD: Yes, Your Honor. Nothing -- nothing about the June 1 Memorandum says -- again, says anything whatsoever about how the government will use or not use its parole authority. It's just -- it's just something that's not affected by the June 1 Memorandum either way.

THE COURT: Okay.

MR. WARD: And so in terms of -- I would just say on the healthcare and other costs that have been found sufficient to find standing in other cases, those are, again, the deferred action cases. So those are cases, again, where judges, including judges on the Fifth Circuit, found that the provision of lawful status provided by DACA or DAPA would allow them to directly access social services, licenses, other benefits.

Nothing about -- again, MPP doesn't say anything about parole one way or the over. It certainly doesn't provide any sort of affirmative lawful status.

And then just in terms of -- I think Plaintiffs'

counsel brought up the 100-day pause suspension, there, that was a -- that finding was based on detention space, and so what the finding there was based on is that there are provisions that say the United States shall remove certain individuals, individuals with final removal orders.

And what the judge found there is that not removing them meant that they had to be detained in the United States. There's no dispute about that in that case, which meant that, if they had to be detained in, say, Texas' detention space, that was a direct cause directly traceable to that action. So, again, we're not talking about just general alle --

THE COURT: And this -- and this goes back to your argument that the *Texas versus United States* case from 2015 at the Fifth Circuit sort of distinguishes this argument for standing from those cases involving those affirmative benefits and things like that. I do -- I have the Government's argument on that.

I'm just trying to identify the relative deltas which might bear upon the costs, the displacement effects, all of the harms alleged by Missouri and Texas, and I want to make sure that I have the Government's case on which data and which deltas I should refer to. I think I have this at that point.

So that concludes the Court's line of questioning on standing for the United States.

So you may proceed on a claim-by-claim basis with the perspective of the United States on the four claims pending.

MR. WARD: Yes, Your Honor. So in terms of challenges to agency action, there are a number of other barriers —— and some of them were discussed earlier —— to bringing a challenge to a federal agency that are implicated here. A number of them are located in 5 U.S.C. Section 701 of the APA, provisions (a)(1) and (a)(2) that Plaintiffs' counsel talked about this morning.

So provision -- Section 5 U.S.C. 701(a)(2) is a provision that says, if agency action is -- there's no review of agency action that is committed to agency discretion by law.

So this is an action that the authority for implementing MPP is based in 8 U.S.C. 1225(b)(2)(C). That's a provision that provides the authority for the federal government to temporarily return someone to a contiguous territory while awaiting their removal proceedings in immigration court.

That provision says that the government may use that authority, but provides no standard for when it has to use that authority. There's no mandatory language in that provision.

And courts have recognized that, even in the

context of mandatory language where a statute says "shall" or has other mandatory language like that, that the --

THE COURT: It's amazing how many of these cases turn on the difference between "may" and "shall."

(Laughter.)

MR. WARD: It's a lot, Your Honor. But even with mandatory language, that deeply-rooted tradition of prosecutorial discretion remains.

So the Supreme Court said in the *Castle Rock* case that prosecutorial discretion remains even in the presence of seemingly mandatory commands in a statute.

And the Fifth Circuit said, again, in the *Crane* case that the concerns justifying criminal prosecutorial discretion are greatly magnified in the deportation context.

So those apply even more greatly here, and that's because a lot of these cases trace back to the Supreme Court's decision in *Heckler v. Chaney*, which addressed discretionary and unreviewable agency decisions. The language in *Heckler* says that refusals to take enforcement steps are presumptively discretionary and not subject to review because they involve a complicated balancing of a number of factors, peculiarly within the Executive's expertise; whether agency resources are best spent on this violation or another, whether the particular enforcement action requested best fit the agency overall policy choices.

So that's precisely what we're dealing with here. We have a statute that provides a range of different options for the administration to use with respect to individuals arriving in the United States.

Plaintiffs don't dispute that there are options under the statute, and because the statute sets no particular standard that can be applied for when it -- when the agency must or should use that, that authority, it's an unreviewable discretionary decision.

The Fifth Circuit specifically addressed this type of decision in the 2015 DAPA decision. It said, again, quote: We reiterate that DAPA is much more than a nonenforcement policy which would presumptively -- which presumptively would be committed to agency discretion. The Secretary has broad discretion to decide whether it makes sense to pursue removal at all. The general exception to reviewability provided by 701(a)(2) for action committed to agency discretion remains a narrow one, but within that exception are included agency refusals to institute enforcement proceedings. That's at Page 165 to 166.

So the Court there -- again, as a lot of distinction, I think, comes up a lot in these cases between the deferred action cases and this case, that the Fifth Circuit said explicitly, if this was just the nonenforcement part of DACA, that that wouldn't be reviewable, and the

states didn't even try and challenge that aspect of it if it's a nonenforcement decision.

It was the affirmative benefits that created a focus for judicial review and action there and brought it with outside -- outside this exception in 701(a)(2).

Plaintiffs' counsel cited *Regents* this morning. *Regents* said exactly the same thing; said, when an agency refuses to act, there's no action to provide a focus for judicial review. But DACA did not announce a passive nonenforcement policy; it created a program for conferring affirmative immigration relief.

So this distinction between affirmative relief and just the discretionary decision not to enforce or use a particular statutory provision in favor of a different one run throughout these cases.

And then just one other, I think in here is another Texas decision, the Texas -- the Fifth Circuit's decision in *Texas v. United States* from 1997. This is 106 F.3d 666. There, the Fifth Circuit said: The INA commits enforcement of the INA to the Secretary's discretion, and the allegation that defendants have failed to enforce the immigration laws or pay the costs resulting therefrom is not subject to judicial review. This is because an agency's decision not to take enforcement actions is unreviewable under the Administrative Procedure Act because a court has no workable

standard against which to judge the agency's exercise of discretion.

Again, that's -- the Court was citing the *Heckler* case there, which comes up in all of these decisions on discretionary determinations an agency might make.

But, again, as the Supreme Court said in that case, where the statute doesn't provide a particular standard to judge whether or when or how an agency should use a statutory provision, there's essentially no law to apply, and so it falls within this exception to reviewable agency actions for agency actions that are committed to agency discretion by law.

There's another provision -- unless Your Honor has any questions about that particular provision.

THE COURT: No, I have your argument on that, and I know the 1225(b)(2)(C) argument that the Government makes, there are multiple references to *Heckler*, so I think the Court has the argument of the United States on that point.

And this Court will be tasked with distinguishing between a line of authority on cases that imply some affirmative benefit and turn -- and turns on that sort of distinction, and then also the amount of discretion that inheres in the Executive's authority to administer immigration policy. And then, of course, that must be balanced alongside the arguments that the Plaintiffs make in

turn.

So I have that argument. You may move either to a sub-argument of the APA claim or to the next claim.

MR. WARD: Yes, Your Honor. So another bar that prevents a challenge to agency action here is the one in 5 U.S.C. 701(a)(1). That says that there's no agency review where other statutes preclude review. I think there are a number of statutes that are relevant here.

Plaintiffs' counsel said this morning that the Government doesn't argue that any of these provisions apply directly. That's not exactly correct, Your Honor. There are a number of provisions within the INA that directly apply and limit jurisdiction to consider challenges related to the way the process by which an individual's removability is determined.

THE COURT: I feel a toll booth approaching.

MR. WARD: A toll booth.

(Laughter.)

THE COURT: But you don't have to use that metaphor, I understand.

MR. WARD: So the first provision —— and I think this one applies directly here —— is 8 U.S.C. 1252(b)(9). That's a provision that says: Judicial review of all questions of law and fact arising from any action taken or proceeding brought to remove an alien may be brought only

through the petition for review process, which is a process by which only the individual alien can bring a claim challenging the way in which their removability was determined.

The statute says in sub -- that stat -- 1252(a)(5) says that's the sole and exclusive means of judicial review for those questions. And, again, that's not just questions of removability or that arise in the immigration proceedings or the proceedings before the immigration judge. It says any -- any claims or questions arising from those proceedings arising from any action.

So Justice Scalia said -- again, in the *Arab-American Anti-Discrimination* case said that this provision is a general jurisdictional limitation channeling review of all decisions and actions leading up to and consequent upon removal.

The Plaintiffs cited the decision in *Regents*, but, again, *Regents* is distinguishable on the basis of considering affirmative benefits versus considering deferred action. So if you are addressing deferred action or whether someone was going to be removed, then you're more in the context of a determination related to removability that falls under 1252(b)(9).

And what the Supreme Court said in *Regents* is, it distinguished that and acknowledged its earlier holding in

the *Jennings* case that 1252(b)(9) applies to any part of the process by which removal is determined.

So this is plainly a part of -- 1252(b)(2) is part of the process by which removability is determined. DHS has to determine whether they're going to put someone in the type of proceedings that leads to return to another country or a detention within the United States or expedited removal. There's a range of options. And the Supreme Court has said that 1252 provides a general jurisdictional limitation that channels all claims related to that through the --

THE COURT: And counsel -- counsel for the United States was present when the Court engaged in a prolonged colloquy on general versus particular, the various Latin canons that can be used to make the distinction.

I think during that line of questioning I asked the question about the judicial review provisions of 8 U.S.C. Section 1226(e), 1252(a)(2)(B)(ii), and then 1182(d)(5)(A).

Do I understand the Government's argument on that statutory construction to be that *Arab-American* and *Regents* both counsel that those should be given general jurisdictional bar construction?

MR. WARD: Yes, Your Honor.

THE COURT: Okay. I think I have the Government's argument on that point. I think that's well briefed by both sides.

So I do understand it is this Court who must decide whether we're dealing with a general jurisdictional bar or something that is more akin to a particular case-by-case adjudication.

So I do understand the parties' arguments on that. I do find that it's been well briefed by both Texas and Missouri and the United States.

So you may move forward unless there's a subpart that you need to address.

MR. WARD: Just very briefly, also 1252(g) is another provision that applies here. Again, that's a provision that Plaintiffs have argued that's a specific, applies to particular actions and applies to individual noncitizen claims.

I think Justice Scalia's discussion in the *Reno* case, Anti -- *Arab-American Anti-Discrimination* --

THE COURT: I think I referred to it as Arab-American, but it's actually the Anti-American -- or Anti Arab-American League, or something like that, so I failed to put an "anti" --

MR. WARD: Yeah, that's --

THE COURT: -- in front.

MR. WARD: So Justice Scalia in there, in that case, I think sets out the -- explains this, I think, very well and says that, yes, 1252(g) talks about particular

individual actions along the road to removal, and so it's -- that provision is not a general jurisdictional limitation because it identified particular actions it covers.

But he also said that how do we know it's not a general jurisdictional limitation. He said because Congress plainly knew how to create general jurisdictional limitation when it wants to, because you just have to look a few sections down in that same statute to 1252(b)(9). 1252(b)(9) represents a type of general jurisdictional limitation.

And then, again, just briefly, Your Honor, the cases we cite in our brief from the Supreme Court *Block*, in *Fausto*, there is, of course, a presumption of review of agency action where the Supreme Court has said again and again that evidence that Congress created a particular scheme for certain individuals to be able to challenge types of issues or claims but didn't provide that right to other people or other groups or states, that's strong evidence to rebut the presumption of judicial review by other individuals.

THE COURT: I had Justice Scalia as a professor, and, for that reason, I have several books on canons and textualism and statutory construction. And I understand I have good arguments on both sides, whether to give sort of a general construction to this or whether this is a particular judicial review provision that should be read as a

case-by-case adjudication bar or relevant to those case-by-case adjudications, so I think this was well briefed by both sides.

Do I understand your best cases for giving that juris -- that general jurisdictional bar arguments are *Regents*, *Reno*, and *Block*, and I think that's reflected in your brief.

MR. WARD: I don't know about *Regents*, Your Honor. *Regents* is sort of one we distinguish, but *Block*, Fausto.

THE COURT: *Fausto* was the case that I was missing. Okay.

MR. WARD: *Anti-Arab*. And then I would just also say that the Fifth Circuit's decision in *Loa-Herrera*. So, in that case, the Fifth Circuit talked not about -- it said, when an individual decision is discretionary -- and there it was talking about parole, but it says, when an individual decision is discretionary under the statute, that, not only the decision itself is discretionary and unreviewable, but the manner in which the agency reaches the decision. The statute -- the overall statutory structure and guidance and whether that complies with statutory and constitutional requirements, those are similarly discretionary when the individual statutory determination is discretionary. So I think that case provides some helpful guidance on that specific versus general jurisdictional question.

THE COURT: Okay. So I -- and, again, the Court does find that this issue was well briefed both by the Plaintiffs and the Defendants. I think I have the relevant jurisprudence, the relevant statutes. These all guide the Court's construction of the various judicial review subsections within the INA. It's that statutory construction that's relevant to multiple arguments.

Is there anything else from the Government on those judicial review sections and what sort of guidance should be gleaned from that? Is there any additional argument, or does the Government stand on its paper and argument at the bench?

MR. WARD: On the bar, those bar --

THE COURT: Right. Yeah. So various statutes have these. I'm thinking in particular, I think, it's 1225(e) -- or 1252(e), there are these judicial review sections. We're having a fight about whether that is a case-by-case determination that is subject to Article III review or whether those are jurisdictional bars. And I'm getting competing case law from both sides.

Is there anything else from the Government other than what's on the paper or presented in court today?

MR. WARD: Not on those particular bars. There's just a couple other --

THE COURT: Okay.

MR. WARD: -- bars I want to talk about briefly.

THE COURT: You may proceed.

MR. WARD: One of which is the zone-of-interests test, is that the Supreme Court has said that the APA does not allow suit by every person suffering an injury-in-fact; that the plaintiff has to be -- the plaintiff must fall within the zone of interest sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.

So, here, the 1225(b)(2)(C) is the basis of the complaint. There's nothing in that statutory provision that anticipates or considers that states might be able to bring a suit to enforce it.

And there's -- the cases cited in our brief sort of set out similar circumstances in which courts have found individuals trying to argue they were within the zone of interests of the immigration statutes because they want to contest a particular level of immigration or a particular impact of immigration on a certain region, they -- that's not enough to get within the stat -- within the zone of interests.

What the test the Supreme Court has set out is whether an intent to bar suit by the individual, the plaintiffs in a particular case is fairly discernible from the overall statutory scheme. So I think this relates somewhat to the 1252(b)(9), 1252(g), 1252(a)(2)(B)(ii)

provisions. That those indicate that -- those are provisions within the Immigration and Nationality Act which limit review and indicate that Congress had a particular view about who could bring those types of suits.

The final barrier to review here, I think, is in 5 U.S.C. 704. That limits agency review to final agency actions. So as cases have held in previous challenges challenging the legality of MPP itself, MPP was just general policy guidance. It was not a -- it was not the type of announcement that set final rights or legal consequences.

I think the parties agree that the relevant test is the one set out in the Supreme Court's *Bennett v. Spear* case where, in order to be a final agency action, the action has to be one that determines legal rights or legal consequences and consummates the agency's decision-making process.

What other courts have held is that MPP did not do that because it left discretion to the individual officers to determine whether or not to return an individual. So that individual determination was what consummated the agency's decision-making process, and what, if anything, determined the legal rights and consequences for that individual.

It's standard agency law that, when an agency puts forth guidance that will affect the scope or how an agency approaches a decision but won't take any effect, any concrete effect until its applied in a particular adjudication or

case, it's that adjudication or case that's the final agency action, not the intermediate steps and guidance.

And so the memo -- if the memo itself was not a final agency action, then the rescission of it similarly is an unreviewable -- is unreviewable as not being a final agency action.

THE COURT: Okay. And that goes to your briefing on finality and the analysis the Court should apply there as well?

MR. WARD: Yes, Your Honor.

THE COURT: Okay. I have the Government's argument. I have the United States' argument on that point.

Any additional arguments on Claim 1, the APA arbitrary and capricious claim?

MR. WARD: Yes, on the merits, Your Honor.

THE COURT: Yes. You may proceed with that.

MR. WARD: So on the merits, the APA standard of review is highly differential.

Here's what the Fifth Circuit said in *Texas Oil & Gas Association v. EPA:* If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld.

It's a very differential standard, and the June 1 Memorandum easily meets that standard here. The Secretary said that he considered the -- all the announcements for when

MPP first came out and the guidance for MPP, the goals that MPP was designed to achieve, the reviews of the program, including a top-down review of the program in 2019, considered the costs and benefits of maintaining MPP as it was, the costs and benefits of terminating it, and the costs and benefits of alternatives, retaining it in some form, putting more resources or -- into reworking or redesigning the program to try and make it work better.

And, ultimately, the Secretary determined that the costs of making MPP work in the way it should were far outweighed by the benefits of other initiatives that the agency and the Secretary and the current administration believe will better manage migration and achieve the goals of MPP.

So, in doing that, the Secretary addressed the specific goals that were set out in MPP itself, addressed the goals that were set out in those reviews of the program, and including the 2019 review of the program that Plaintiffs were talking about this morning.

The first goal of MPP, as set out, was that it was in -- this is what the Secretary says, is that it was originally intended to more quickly adjudicate legitimate asylum claims. The Secretary reviewed the evidence in the record of whether that had actually happened and determined that there were real questions about whether it was

successful in prioritizing agency resources on legitimate asylum claims.

In particular, the Secretary noted the high rate of in absentia orders as raising questions about whether it was effective. So 40 -- the Secretary found that there were -- 44 percent of the cases that were conclu -- that went through MPP and reached a final decision, got a conclusion ended in absentia orders.

Plaintiffs say that there's been times, other time periods where there were high rates of in absentia removal orders, but the evidence in the record supports that, if you look at, say, 2020, when sort of the core time period -- or 2019 or 2020 when MPP was in place, there's evidence in the record at -- I believe it's AR660 to 663 that shows higher rates of in absentia removal orders during that time period for individuals in MPP as compared to non-MPP individuals.

So the overall in absentia rate as compared to earlier time periods or before MPP isn't necessarily determinative of what effect MPP was having, but I think that the record supports that, if there were higher rates of in absentia orders for non-MPP individuals than there were for MPP individuals, then that undermines the conclusion somewhat that MPP was really focusing on legitimate claims. If it's really focusing resources on legitimate claims, then it should be deterring individuals with frivolous claims from

coming. And it's only people who are ultimately going to get relief through MPP that would still go through the entire program to its inclusion.

And, again, there's nothing -- I've seen no argument, I'm aware of no basis to conclude, if MPP was successful in deterring individuals from coming to the United States at all, those individuals don't know whether they're going to necessarily be subject to MPP before they arrive or not.

So there's no reason why the in absentia removal rate should be so much higher for MPP individuals than non-MPP individuals if the program was functioning as it was intended, to prioritize legitimate claims.

And the Secretary said in his memo that this raised questions about whether the individuals that were waiting in Mexico to pursue legitimate asylum claims, whether they had access to resources, housing, and support, they needed to see those claims through.

And I think this is further supported by the outcome of those claims. So there's in the record at -- this is AR -- at AR554 to 555. There's a document called MPP Metrics and Measures. That document shows the outcomes of proceedings for individuals that were in MPP. And the data goes through December 31st of 2020, so the end of last year.

And what that document says is that, as of the end

of last year, 44,000 -- over 44,000 cases had been completed through MPP, and 531 individuals had been granted relief. So out of the cases that were actually completed through MPP, only 531 individuals received asylum. A rate of approximately 1.4 percent of individuals actually got relief as they went through MPP.

So, again, the Secretary determined that, based on this evidence in the record, that there were real questions about whether MPP was hitting its intended goal of allowing the agency to focus its resources on legitimate asylum claims.

Now, Plaintiffs argue that raising questions is not enough, but the evidence in the record supports that conclusion.

And, as the Supreme Court said in the *Prometheus Radio* case just this year that we cite in our brief, it's not uncommon for agencies not to have a complete empirical study or complete evidence; that agency action often requires the Secretary or someone within the agency to look at the evidence before the agency and determine based on that what their best view of sound policy is.

Explicitly, the Supreme Court said that there is -- the APA imposes no requirement for an agency to conduct scientific or empirical studies before reaching a conclusion.

And so the Secretary's conclusion that MPP was

maybe not that successful in reaching its intended goal of more quickly adjudicating legitimate asylum claims, it's supported by the record.

The second goal that the Secretary talked about is that MPP was designed to clear asylum backlogs. The evidence in the record shows that asylum backlogs both for cases before asylum officers within U.S. Citizenship and Immigration Services or the backlog of cases in immigration court, those both increased during the course that MPP was in place.

The next goal was to deter individuals from attempting to come to the U.S. and allow DHS to focus more -- resources better on meritorious claims. The Secretary noted that more than one-quarter of the individuals enrolled in MPP were subsequently re-encountered attempting to enter the U.S.

And so he determined from that that it's not clear that MPP was deterring individuals from actually trying to come to the United States. We were returning them to the other side of the border where they would continually try and enter the United States. Many were re-encountered multiple times.

And, obviously, we don't know for sure whether they were able to capture or identify everyone who was placed in MPP and tried to come back into the United States. And so it's possible that what MPP actually did was build up a group

of individuals just outside the border who continued to try and come into the United States in a way a program that might be more less successful at ensuring individuals weren't getting into the United States than other --

THE COURT: The Court here followed counsel's argument referring to record Document 61, AR554 and AR555. I do have and find that the Government has well briefed its argument on the data, and the Supreme Court's guidance that not every cause-and-effect analysis needs to be reduced to metaphysical certitude.

But I've now heard —— and I see this reflected in the Secretary's memorandum —— that the data analysis raises questions. There's sort of a fog-of-war terminology that goes into the Secretary's analysis of MPP up to this date.

But relevant to the APA claims and this Court's task of determining whether it was arbitrary and capricious, all of this vernacular about the data set raising questions —— this appears in the memorandum; this has appeared in the Government's argument today —— are there answers to those questions anywhere in the record, or is it just that the government cannot ascertain one way or the other the effectiveness of MPP?

MR. WARD: So I think --

THE COURT: So, here, you know, we have enough data to ascertain that 531 MPP aliens were granted relief. We

have on Page AR555 —— actually, this is just the second page of that same document —— the goal of MPP is to provide a deterrent to illegal entry. That's followed by this statement: Metric MPP implementation contributes to decreasing the volume of inadmissible aliens arriving in the United States on land from Mexico.

I see in the Government's written arguments and oral arguments today a lot of questions raised, and I understand, you know, particularly early in administration you may not have the data set to give with particularity an answer to the cause-and-effect analysis that we're all doing here.

But is there any point in this record where those questions raised about the effectiveness of MPP are answered in any sort of conclusion from the Secretary that reflects his consideration of all of these data points and all the questions raised?

Where would you point the Court to to identify the answer to those raised questions?

MR. WARD: So I think the proper way to frame the question is not whether or not ultimately MPP was completely successful, or there's a lot of ways in which you can assess success. It obviously wasn't completely successful. It -- I think it's fair to say that it probably deterred some individuals from coming to the United States.

What's the actual answer to that, I'm not sure it's known from this record, but I don't think the Secretary's job is necessarily just to determine whether MPP was successful. The Secretary's job is to determine what initiatives does DHS or the current administration want to take in order to manage migration and comply with our obligations under the statute.

And I think what the memorandum says clearly is that the Secretary determined that, for whatever successes MPP may have had, that the current administration believes that there are other ways to better and more effectively achieve those same goals; that MPP required a tremendous amount of DHS resources even when it was in effect in order to manage, staff these immigration courts along the border, in order to constantly be paroling individuals back and forth into the United States, and in order to continue to negotiate with Mexico about supporting the individuals that were going to be in Mexico while they awaited their removal proceedings.

And so what I think the Secretary definitively determined is that MPP is not as successful in the current administration's view as other things the agency and the United States can do to manage migration; that freeing up diplomatic resources that were used to negotiate and support MPP, those resources could be used for other initiatives. Mexico could redeploy individuals that were dealing with the individuals that were living in these camps that sprung up

along Mexico's northern border to dealing with individuals when they were transiting through Mexico; that those resources could be put to other -- other initiatives that would better achieve the same goals of managing regional migration, deterring frivolous asylum claims, but also making sure that DHS could focus their limited resources on legitimate claims.

I think the -- the couple cases from the Supreme Court that address this are help here. I think Justice Rehnquist's concurrence in the *State Farm* case, which we cite a few times throughout our brief, says that, as long as an agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.

And also the Supreme Court's decision in *FCC Television v. Fox* [*sic*], which said that an agency need not demonstrate to a court's satisfaction that the reasons for a new policy are better than the reasons for the old one; it suffices that the policy is permissible under the statute, and there are good reasons for it.

So I think the determination about whether MPP was successful is -- is in the memorandum in the form of the Secretary determining it was not as successful as what the administration believes it's now undertaking and needs some time to undertake to better achieve those same goals.

THE COURT: Okay. And I think I have the Government's argument there. And, obviously, the June 1 Memorandum reflects some of those points as a factual matter, and I also will pair that with the legal arguments and cases cited by the United States.

You may move on to your next point.

MR. WARD: Does Your Honor have any additional questions on the merits of the APA argument, or should I move on to the INA argument?

THE COURT: Yeah. Unless there is anything -- if it would just be cumulative of your briefing, you may move forward to what I've identified as Claim 2, the statutory INA argument.

MR. WARD: Yes, Your Honor. So the statutory argument, or 1225(b)(2)(C), their -- Plaintiffs' argument that terminating MPP violates Section 1225, this overlaps somewhat with the APA claims and the arguments I made earlier about the discretionary nature.

But nothing in 1225, again, says that the agency has to use this contiguous return authority, and nothing in it sets any particular standard for when the agency has to use it.

I think Plaintiffs' claim here, and their briefing focuses heavily on the use of parole, nothing in 1225(b)(2)(C) talks about parole or sets it out as a required

factor the agency has to consider in determining whether or when it's going to use this return authority that was the basis of MPP.

There is -- and, again, there's nothing in MPP itself that says anything about narrows or requires the agency to use parole in a particular way. It doesn't say, we're terminating MPP, and we're necessarily going to parole these individuals. Parole remains a case-by-case determination of the agency in individual cases about whether parole is appropriate that involves a lot of factors. The June 1 Memorandum says nothing about how those factors should be weighed or resolved.

So I think if -- Plaintiffs' claim here is really a challenge to parole, and if they -- if they believe that there is evidence that the government is misusing parole or they want to challenge the parole authority, then they should bring that case.

I took them this morning to say that they're not directly challenging the government's use of the parole authority. I think that's in part perhaps because there's a lot of decisions that say that's a discretionary determination, and that the government has discretion to use that parole authority, again, *Loa-Herrera.*

It's a discretionary judgment, including whether the procedural apparatus supplied satisfies regulatory,

statutory, constitutional constraints are not subject to review. That's the Fifth Circuit in *Loa-Herrera*.

Other cases, the Eleventh Circuit's decision in *Jean v. Nelson* said, quote: Congress has delegated remarkably broad discretion to executive officials under the Immigration and Nationality Act, and these grants of statutory authority are particularly sweeping in the context of parole.

So there's a lot of judicial decisions out there addressing the breadth of the discretion and scope of discretion of the agency with respect to its parole authority, but, again, parole is not something they're squarely challenging here. It's not squarely implicated by 1225, and so I think if -- since -- since nothing in 1225(b)(2)(C) requires the consideration of parole, and nothing in 1225(b)(2)(C) requires the creation of MPP whatsoever, the termination of MPP itself can't violate Section 1225(b)(2)(C).

THE COURT: Okay. Understanding that 1225(b)(2) -- and this was reflected in Mr. Thompson's presentation to the Court. There's essentially a binary choice there, and one of those provisions, the (2)(A) provision, says, aliens shall be detained. And, again, we're back to the disputed meaning of "may" or "shall" in giving construction to these various statutes.

Particular to capacity and some of the Government's explanations of being overwhelmed and taxed, does the federal government have capacity to fill -- fulfill that statutory mandate for those aliens who shall be detained?

Unlike some of the other provisions and Fifth Circuit cases distinguishing discretionary authority from mandates, I understand those statutory construction arguments, but now particular to the facts reflected in the record before the Court, does -- is it the position of the United States that they have sufficient capacity to fulfill the 1225(b)(2)(A) mandate to detain those aliens that shall be detained?

MR. WARD: Well, again, Your Honor, I think this comes back to my earlier point that the Secretary believes that the other initiatives the agency is undertaking will reduce the burden on the agency and surges of migration to the southern border that will help address that.

I don't have a definitive answer on what the current -- right today or this month, what the influx of individuals arriving at the border is and how that compares to our detention space. That's a -- those are both fluid issues, and I don't have numbers on that.

But, again, I'd say that's not an issue that's squarely before the Court here. Plaintiffs don't directly challenge the parole authority or the use of 1252(b)(2)(A).

And while that provision may have mandatory language in it, there's no language between 1252(b)(2)(A) and 1252(b)(2)(B), 1252(b)(2)(C), there's nothing -- there's no language in there that sets these out as the only alternatives or sets them as factors that must be considered together on when to use the contiguous return authority.

So for -- to put it another way, there's nothing in 1252(b)(2) that says Congress intends for the Secretary to either use the contiguous return authority or use the detention parole authority under 1252(b)(2)(A). There's nothing in there that sets those out. They're different options the Secretary can use, but nothing about what 1252(b)(2)(A) says or nothing about what's in 1252(a) necessarily sets any standard for when the government must use the contiguous return authority or create a program like MPP.

THE COURT: Okay. And, you know, I would guess that's almost like a compound question, because it's one part statutory construction, one part a question about the facts, and the denominator of capacity this Court must consider, and this goes back to some of the standing analysis.

You know, if there's an absolute denominator -- that's probably the wrong word. If there's one million beds available for persons detained, and the government experiences a surge of 1.5 million, I would know exactly the

delta to apply to that number.

But, thus far, I don't see anything from the government in the Administrative Record that sort of aggregates all of those different categories so that I can ascertain detention capacity and thereby give absolute certitude to how much that capacity has been exceeded, and whether the government is using parolee status as a safety valve to that.

I understand the Government's argument on this. That question is one part statutory construction, one part data Administrative Record. And I think you've answered this question probably twice now or an iteration of it, so I have -- I have the Government's response on that.

MR. WARD: Thank you, Your Honor. Just one other point that I think might be relevant here or it may be relevant to some other point, is that earlier you asked that we address the question with respect to the footnote in the document --

THE COURT: Yes.

MR. WARD: -- in the Motion to Strike.

So, again, I think that goes sort of to our broader arguments on the Motion to Strike, that this is sort of a risk when you start looking at evidence outside of the Administrative Record or outside of evidence that the agency says is relevant to its determination.

But, essentially, what happened there, my understanding of what happened there is that that footnote was inaccurate; that it didn't come to our attention or the attention of the attorneys with our client until it was cited in the Appendix. When it was cited in the Appendix, we -- we pointed that out to our clients who corrected it.

And so the website no longer reflects that point. It's not an accurate representation of the agency's position, and so it would inappropriate to give weight to something that the agency said was an error and corrected as soon as it was brought to their attention.

THE COURT: I have the Government's argument on that, and I do understand that argument.

Does that complete any oral argument supplement to the Government's briefing on Claim 2, the INA claim arising under 8 U.S.C. 1225?

MR. WARD: Yes, Your Honor.

THE COURT: Okay. You may proceed with your argument on the Take Care Clause claim. I've identified this as Claim 3. Anything that's not cumulative of the written material before the Court?

MR. WARD: Yes, Your Honor. Just I think our briefing covers this well, but essentially the cases have long said that this is not a basis for a judicial -- justiciable claim.

Mississippi v. Johnson from 1866 says that this doesn't provide any power for private litigants or other individuals to sue to oversee the President's authority. It's essentially more like a grant of authority to the President, but it doesn't -- like some of the other things we've talked about today, it doesn't provide any standard to apply.

More recent cases that we've cited in our brief, the *CREW v. Trump* case out of D.D.C., affirmed by the D.C. Circuit noted that you can read this early line of cases from the 1800s addressing this constitutional provision is -- as reading it as being completely non-justiciable and finding no recent cases finding that's a valid claim that can be stated.

And I think, again, the *Texas v. U.S.* decision from 1997 of the Fifth Circuit said that -- there, plaintiffs argued that defendants had failed to enforce the immigration laws and pay the costs thereof. The Fifth Circuit held that real or perceived inadequate immigration enforce -- real or perceived inadequate enforcement of the immigration laws does not constitute a reviewable abdication of duty.

So there's no -- the cases -- all the cases that have addressed this, and there's not a lot of them honestly, Your Honor, but all of them have come to the conclusion that the Take Care Clause does not itself provide any standard by which to judge or review the Executive Branch's decisions.

The only source of law here to take care that the laws be faithfully executed would be the law itself, so in a way this overlaps completely with their 1225 claim. And as courts have said, including Judge Hanen just last week, when there's an overlap of claims --

And I think they're even greater here. This is just an attempt to constitutionalize their 1225 claim. The claim, at least as I read it, is the same, either the Plaintiffs claim that the government is not following 1225 and that they're not taking care that the laws be faithfully executed by following 1225.

I think particularly, when there's a complete overlap of claims here, I don't -- I don't see how the Court could resolve the claims going in different directions, so I think it just resolves to how the Court rules on the INA claim, the 1225 claim.

And that's what Judge Hanen said just last week, that given the lack of authority finding that this is a valid -- a valid basis for a claim, and the overlap with APA claims, that it's not appropriate to reach that claim.

And, again, just this claim in Plaintiffs' briefing they articulate it as -- the standard is that the Executive Branch cannot take steps that prevent its compliance with congressional mandates. At the argument this morning, they said that the government can't take steps that conflict with

a statutory command.

But, again, the Government's position here is the same thing as under Section 1225. There is no particular mandate to use the contiguous territory return authority or to create MPP. There's no statutory mandate that's being violated. And so this -- Plaintiffs have -- the Government's position is the Plaintiffs have failed to state a claim here whatsoever.

THE COURT: Okay. And I'm sure counsel for Missouri, Texas, and the United States have had an experience similar to this Court. Lots of law review articles on the Take Care Clause, not a lot of jurisprudence.

(Laughter.)

THE COURT: So we're all in a way flirting with a case of first impression when trying to give application to the Take Care Clause.

What about -- lurking in sort of those -- in those briefs is the difference between the Larson Doctrine, which sounds in equity, and the Take Care Clause, which is a constitutional claim, is there a functional difference between a Larson Doctrine approach to the question and what the Plaintiffs have asserted in their Take Care Clause claim?

MR. WARD: So I'm not sure I understand the question, Your Honor. So the Larson Doctrine, as I take it, is a doctrine that relates to sovereign immunity and whether

sovereign immunity is a bar to a claim where an executive official is acting outside of their authority or beyond their authority, so essentially --

THE COURT: So the jurisprudence does reflect courts -- there's not much case law, but the federal courts have generally affirmed, you know, equitable authority under that doctrine to give litigants a basis for challenging executive agency action.

There's not the same resistance to that as the Take Care Clause claims that ask this Court to invoke a similar authority.

Is it just that they are drawing from different wells, but they're conceptually the same?

As I consider this Court's authority to review agency action, if I get to the same result, but I draw upon the jurisprudential well of the Larson Doctrine or the constitutional text of the Take Care Clause, does it much matter to the United States if the effect is the same?

MR. WARD: Well, I think there's a problem under either formulation, and I think it's --

THE COURT: This was not briefed by either side, but, you know, in reviewing as many cases as we could find, this Larson Doctrine lurks in footnotes and in other courts' opinions.

I just wanted to know -- and you're not -- this

isn't directly briefed by either side, but as a conceptual matter and whether this Court can assert authority over agency action and, in essence, force a separate branch of government to execute and ensure that laws are faithfully executed, does it much matter if the Court invokes the Larson Doctrine, which sounds in equity, or the Take Care Clause, which sounds in statute?

It may matter to separation of powers questions and things like that, but if the effect is the same, does the United States have a position on the Larson Doctrine?

MR. WARD: Well, I think -- and, again, I probably need to think about this some more, Your Honor, but I think the position is that under the Larson Doctrine --

So this would be the doctrine where courts have power in equity to restrain an executive official acting in some way that violates the Constitution. Is that -- am I understanding that correctly?

THE COURT: Yes. That's a nice nutshell of it, yes.

MR. WARD: And I think in that sort of -- that -- so the Larson and the line of cases that came out of that came from this period of jurisprudence around sovereign immunity, which is why I think this often gets connected with sovereign immunity, that pre-dates the APA. So the APA in a way ended up -- the APA includes a waiver of sovereign

immunity, in which the Supreme Court -- in which Congress intended to sort of get around all of this complicated jurisprudence about what was reviewable and what wasn't and determined that we'll waive sovereign immunity for particular claims under the APA and set out provisions for how that review should go. So we'll waive it for APA claims, but it should follow the APA standard.

I think there's a -- there's a number of law review articles about this by Justice Scalia as well before he was Justice Scalia talking about how the Sovereign Immunity Doctrine preceding the enactment of the APA was -- is sort of hard to follow and inconsistent, even when you look at the Supreme Court cases.

But I think this line of cases about sort of ultra vires action that violates a constitutional right and whether the Court would have power to restrain an executive official of violating a right, I think that line of cases is still out there, and it's uncertain how it interacts with the existing APA authority.

But I think the Government's position would be that, there, still you need to point to a particular individual constitutional right that might be violated. So if you say that some sort of executive official is going to violate a Fourth Amendment right in some -- some fashion, that they're acting outside of their scope of their

authority, and the Court might have authority to restrain that.

We're not talking about any sort of individual constitutional right here. We're talking about that -- the only constitutional claim that the states bring here is the Take Care Clause. The Take Care Clause, again, all the cases that I've been able to find on it say it doesn't set any particular standard.

So it's unclear what -- how exactly a court would even apply that to say that this -- I guess it would require finding that Secretary Mayorkas was not acting in his official capacity; he was acting as a -- in his personal capacity because he didn't have authority to violate the Constitution by violating the Take Care Clause.

I think that's a -- I don't know that that -- I think the problem there with the Take Care Clause or with the Larson Doctrine is that we're not dealing with the type of individual constitutional right that provides this standard to apply.

THE COURT: Okay. So the individualized right response of the Government would apply with equal force to either the Larson Doctrine as it appears pre-APA and then certainly what the Government has argued in this case under APA standards and the rest. So I think I understand your point.

That was a bit of an unfair question, so you gave it the law-school try, and I understand the Government's point on that.

If the Court requires additional briefing, I'll certainly issue an order, and I'll have brief page limits on that, but you may proceed.

Does that represent the sum and substance of the Government's position on the Take Care Clause claim?

MR. WARD: Yes, Your Honor. And thank you for your patience with my rambling while I thought that one out out loud.

THE COURT: Yeah. It's -- you know, it's like a federal courts class. Like, it comes up in -- you know, this Court in particular deals with a lot of qualified immunity cases arising from the prison system that's here in this section of the country, so it's always lurking in the footnote, but it's almost never briefed or addressed by the courts.

So I didn't see it here. I didn't know if the United States took a view of that, but I think I understand your argument.

If any additional briefing is required, it will come in the form of a written order from the Court. So you have discharged your duty to this point.

(Laughter.)

MR. WARD: Thank you, Your Honor.

THE COURT: Okay. So now we have -- thank you for giving it the old law-school try.

We will now turn to the fourth claim, and this is what the Court has termed the contract claim or the agreement claim. And I'll hear any argument from the Government at this point.

And, again, the briefing was excellent from both parties. I'd ask that you restrict your argument to anything that's not cumulative.

MR. WARD: Yes, Your Honor. Just a couple basic points that are included in our brief just for context, but, again, the Government's position is that there's no waiver of sovereign immunity for this claim or at least not the way they seek to -- Plaintiffs seek to articulate it here.

The *Lane v. Pena* case, a waiver of sovereign immunity must be enacted by statute, construed narrowly in the government's favor, and unambiguously extend to the type of relief sought.

So there's been no -- to the extent there's been any waiver of sovereign immunity for contract claims against the federal government, it's the Tucker Act, but that limits relief. The type of relief is limited to damages, the typical remedy for contract violations, and it's limited to the Federal Court of Claims.

As the Fifth Circuit said in the *Alabama Rural Fire Insurance Company v. Naylor* case —— this is 530 F.2d 1221 at 1229 —— that, quote: Little imagination is needed to foresee the consequence of holding that such claims as this may be reviewed either in a court having power to grant equitable relief against the United States or in one having none. We refuse to believe that Congress intended in enacting the APA so to destroy the Court of Claims by implication.

And I think that's essentially what we're talking about here. Congress has waived sovereign immunity, but in a particular forum and for a particular type of relief, and to hold that parties could bring claims in other courts for injunctive or other types of relief would essentially -- everyone would do both or choose the forum that was more preferential to them. It would undermine the limits in the Tucker Act for the proper forum to bring those claims.

Also, it's, I think, a problem for Plaintiffs that they don't cite any -- any waiver of sovereign immunity for this particular type of claim here. They allege that, because the former Secretary entered into this contract, they've waived immunity for this type of claim here, but they don't cite any cases showing that, particularly without any statutory authorization to do so, that an executive official could waive immunity for the entirety of the United States for such a claim.

And the cases that they cite to the contrary dealt with states or tribal authorities, cases in which I don't think there was any dispute about whether the individual who entered the contract or purported to waive immunity was speaking for the relevant sovereign there. So, here, we're dealing with something a little bit different.

I think also just in terms of -- I just wanted to make one point that I think came up in the Court's ruling on the Motion to Strike, I believe, about the holding or the Fifth Circuit's ruling in *Naylor.* I believe the Court said that the agreement -- the agreement in this case is allegedly authorized by the Secretary's power to perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.

That's in -- and cites 8 U.S.C. 1103(a)(3). So that's a provision, again, that says that the Secretary can carry out other acts necessary to his perform -- or he deems necessary to carry out his responsibility under the INA.

I think the Government disputes that this provides the power to enter a contract with a state to not exercise a sovereign authority, but to the extent that that statutory authorization allows the Secretary to enter the contract, there's no limitation in that statutory authority to rescind the contract.

And so as I -- as I took a look at *Naylor* again, I

think its holding talks about whether, if there is some sort of statutory limit on the authority of the individual to rescind a contract or violate a contract, then that might be a circumstance when you could say the individual was acting outside of their authority, and maybe the bar to sovereign immunity wouldn't apply.

But the Fifth Circuit said explicitly in *Naylor* —— this is at 1226 —— it says: A suit is not violative of the Doctrine of Sovereign Immunity if the officer's powers are limited by statute, and he acts in excess of that authority.

And then again at -- this is at Page 1227, quote, the Fifth Circuit said, quote: Given the authority of the appellants to award the contract, and the appellee's failure to cite any specific statutory limitation on the appellants' authority as government-contracting officers, it must follow that appellants, as contracting agents, had the authority to rescind the award of the contract.

And then a little bit further down: Even assuming that the appellants' decision and action in rescinding the award of the contract was legally wrong, it was nonetheless within their authority as agents of the government to make the decision and to take the necessary action; thus, the effort to enjoin it must fail as an effort to enjoin the United States.

So what I take that to say is that, if there's

statutory authorization for a contract, if there was some limit in the statute itself, not in the contract, but in the statute itself, to the authority to rescind the contract, it's possible you could argue that the executive was -- had -- was operating beyond that authority, and that sovereign immunity wasn't a bar.

Here, if 1103 provides the authority for the contract, Plaintiffs point to no limit in 1103 to rescinding the contract or any other limit on the statutory authority, so I think this falls plainly within what the Fifth Circuit said that, even if rescinding the contract was wrong, if there's no statutory limit, then sovereign immunity is a bar.

And so if they want to bring a claim to challenge the enforcement of the contract, their remedy and their right and the waiver of sovereign immunity is limited to the Tucker Act.

And then just one other point on 1103, this provision is that the -- the Fifth Circuit addressed this, I believe, in the *Crane* case, and this just goes back to my point that the statutory provisions don't -- I'm sorry, Your Honor.

THE COURT: And this is *Crane v. Johnson*?

MR. WARD: Yes. But, actually, I meant the 1997 decision in *Texas*. That decision says -- that's, again, 106 F.3d 661. That says at the end at 667: Section 1103

places no substantive limits on the Attorney General and commits enforcement of the INA to her discretion. So, again, I think this is a provision that neither authorizes or restricts the ability to rescind a contract, but, under either -- it either does both or neither here. And so I think this claim is clearly barred by sovereign immunity.

THE COURT: Okay. I have your argument there.

And, at this point, I'll instruct the Government to turn to remedies. I understand the nature of your briefing and your position that these Plaintiffs should lose on all four claims, but to the extent the Court is tasked with considering and fashioning relief, any argument on scope, application, the nature of injunctive relief vis-à-vis the Executive's authority to act in diplomatic and foreign relations, anything relevant to remedies?

MR. WARD: Yes, Your Honor. And I think here there's a particular provision in the INA that we cite in our brief that's relevant here that might not be relevant in some of the other cases Plaintiffs cite involving affirmative cases, deferred action applying -- again, applying -- providing some sort of lawful status or affirmative right to remain in the United States.

And that's the provision, the Immigration and Nationality Act, at 8 U.S.C. Section 1252(f)(1). That's a provision that says: No court other than the Supreme Court

shall have jurisdiction or authority to enjoin or restrain the operation of, and then it lists a set of statutory provisions within that range of provisions at Section 1225, 1225(b)(2).

No court shall have jurisdiction to restrain or enjoin the operation of those provisions other with -- other than with respect to the application of such provisions to an individual against whom proceedings under such part have been initiated.

So I think here any sort of injunctive relief requiring the agency to use 1252(b)(2)(C) would restrain the operation of that provision. Again, the Government's position is that that provision says "may." It leaves discretion to the agency about when or whether to use it. It sets no standard.

Any type of injunctive relief requiring the agency to use that -- that provision would insert a standard or leave the discretion out, would remove the "may" term from it.

And so as -- I think the Sixth Circuit in the *Hamama* decision we cite in our brief sets this out well, but we set a couple of other cases as well that, if placing limitations on what the government can and cannot do under the removal and detention provisions are not restraints, it's not clear at all what would qualify as a restraint.

And I think that's what any sort of injunctive relief here would do. It would restrain the operation of 1225(b)(2)(C) as -- as written to require the agency to use MPP.

Again, I think there's no dispute that MPP was a creation of the last administration. No prior administration had an MPP program. This was a new program implementing that statutory authority, which had been there, and used occasionally, but been there for some number of years.

So I think there's -- again, the Government's position is it's discretionary, and it would be improper or violate the -- violate the terms of the INA to grant injunctive relief.

And I think also the cases we cited in our brief just about general oversight of day-to-day agency operations, *Norton*, and that line of cases we cite in our brief, says that it's improper for courts to insert themselves in the day-to-day operation or oversight of an agency; to direct that an agency should take certain enforcement proceedings or exercise its prosecutorial discretion in a particular way; that the proper remedy in the case where -- where a court finds an agency violated the APA by failing to consider relevant factors is to remand to the agency to allow them to correct those and to use their expertise in doing so, to use their expertise and to -- say, the Court determines that

there's a particular factor that the agency didn't consider, it should be left to the agency's expertise to consider that factor, see if it changes its determination, or to address it using their expertise.

I think we cited a number of Fifth Circuit cases in our brief. In *Texas Association of Manufacturers v. U.S. Consumer Protection Safety Commission* and *O'Reilly*, those are Fifth Circuit cases from 2007 and 2021 that say only in rare circumstances is remanding to the agency to allow them to consider any deficiencies not the proper remedy. And this is particularly true when there are deficiencies, the type of deficiencies like failure to address particular factors, failure to consider particular evidence or factors, that the agency could correct on remand.

Again, I don't -- I don't think Plaintiffs dispute that the contiguous return authority is only one option under the statute. There's no -- I don't think there's any mandate here that this administration has to use that provision when others in the past haven't necessarily done so.

And so the question is just whether the Secretary considered the relevant factors in reaching that, and that's something the Secretary can correct on --

THE COURT: And so the Government would pair those Fifth Circuit cases with *Norton* and *Florida Power & Light* to argue, should this Court find a violation particularly on the

first APA claim, the relief is to remand to the agency for additional investigation or review?

MR. WARD: Yes, Your Honor.

THE COURT: All right.

MR. WARD: And I think that's particularly true given the declarations we've submitted both from the Department of Homeland Security and the State Department with our responsive briefing that said it would wreak havoc on ongoing and -- ongoing agency efforts and diplomatic efforts with foreign countries on how the countries are going to work together collaboratively and use resources to address regional migration, to put resources and invest funds and initiatives in other foreign countries.

It would cause chaos to require all of a sudden for those diplomats to have to go back to Mexico and say, you know, we've represented that we want to move in a different direction and focus on these other initiatives. Now, we want to go back and start up MPP again.

The cases we cite in our brief say that, when relief in addition to just remand for further consideration will cause that kind of disruption or chaos, it's appropriate to just remand in order to allow the agency to address that and to use, again, their expertise to determine about what's the best path forward given, you know, reliance interests of foreign countries in ongoing negotiations with the U.S., and,

again, just the damage to international relationships.

If -- if the government is working with the Northern Triangle countries or Mexico and has represented that the current administration believes these are efforts that are going to help all of these countries with their migration issues, all of a sudden having to reverse course and saying -- the administration having to go back and say, we -- we've been enjoined; we don't have the authority to engage in those type of foreign affairs or negotiations undermine -- will undermine trust in the U.S. -- U.S.'s ability to follow through on their commitments or on their representations about the path that the United States will take going forward.

That's, again, set out in those declarations attached to our briefing. And when that type of disruption will be caused by injunctive relief, that that's not the appropriate remedy.

THE COURT: In the Supreme Court cases counseling against judicial entanglement and recommending remand instead, whether it's *Norton*, *Florida Power & Light*, are any of those line of cases particular to immigration?

So when the Article II Executive is acting in foreign diplomacy realms or national security realms, you sort of see the Executive at its very apex of its authority acting outside the water's edge.

Immigration is different because it is -- it's an Article I function. What is the Government's position on how this Court should read the repeated and unbroken admonishment against judicial entanglement in these abstract policy disagreements in this context of immigration, which arises under Article I, which is reserved to Congress and the statutes that it promulgates?

Do they apply with equal force to this immigration context in this case, and should the Court distinguish the immigration context and case law from the cases counseling against meddling in other areas where the Article II Branch is obviously primary?

MR. WARD: I think in --

THE COURT: So in considering -- and we're just talking remedies and relief granted, and I understand the Government's argument on *Norton*, *Florida Power*, these lines of cases. These are all post-APA cases counseling against meddling in agency action. Instead, why don't you just remand and allow for further deliberation or investigation or explanation.

So these all rise after the APA. There are established procedures, NPRM sort of process that you go through. Article III District Court, you should be mindful of those procedures, how that's been delegated, and remand where you are confused about the potential relief and its

interference with those -- with those protocols.

Does that make less sense in an Article I contract -- context where immigration is specifically reserved to a different branch of the government, and immigration policy is then conferred by statute so that this Court may have additional leeway in construing immigration laws and statutes in an Article I contract -- context where it may not have the same sort of reach where the Article II Branch is so clearly the primary actor?

MR. WARD: So, respectfully, I disagree with the assertion that this is solely an Article I issue. So I think cases going back to the 1800s, *Knauff v. Shaughnessy*, and we cite a few of them in our brief, but didn't deeply get into the sort of plenary power --

THE COURT: Well, I appreciate --

MR. WARD: -- doctrine to --

THE COURT: I appreciate that every argument didn't descend into a law review 100 pages long, so --

MR. WARD: It was lengthy --

THE COURT: -- as I've said --

MR. WARD: -- as is.

THE COURT: As I've said multiple times, both sides briefed this case well. I don't need a law review on every footnote, so I understand that there's additional cases, and you can fight the question if you choose to do so.

So I'll hear your argument on why this Article I/Article II distinction and the cases arising therefrom might not counsel the way the Court views it.

MR. WARD: Yes, Your Honor. So I think that the power over immigration is a shared power of the political branches of both the President and of Congress.

So I think that -- we were talking earlier about the *Trump v. Hawaii* case, that's a case in which we were talking about the President's authority to bar individuals from coming in from a foreign -- foreign country.

And so one of the issues in that case was, Congress had delegated authority to the President to make determinations with respect to that, but the Supreme Court also says he has inherent authority in dealing with entry of individuals to the United States under his foreign affairs power.

That's part of -- whenever we're dealing with immigration, we're necessarily dealing with discussions with foreign nations about their individuals traveling here or returning them. And I think that's particularly acute here where the policy at issue would involve and require the agreement of Mexico to take those individuals back.

So I think it -- it might actually be heightened in this circumstance. So I don't know that *Norton* or those line of cases are necessarily immigration cases. Those are -- we

cited those because those are the cases that set out the standard I think more best, but I think it's heightened here where you're dealing with relations with foreign countries and where the Executive is implementing authority set out in the INA, set out by Congress, but where the individual discretionary determinations require negotiations with foreign countries.

I think that weighs more strongly against granting injunctive relief than it would, say, in a run-of-the-mill APA case in which the impact would be also under a statute or the agency's failure to consider relevant factors, or something of that nature, and interpreting a statute or issuing a policy pursuant to a statute that only had a domestic effect.

Here, there's a plain international effect. If the Court -- if the Court were to enter an injunction saying, reinstitute MPP, begin returning to -- individuals to Mexico, that order is essentially unenforceable. Now, the government would have to make efforts and talk to Mexico to make that happen, but the United States Government doesn't have the authority to just return individuals to Mexico without their agreement.

So I think that, because this necessarily implicates foreign affairs powers and negotiations with other countries in executing this, even if -- even if following

whatever Plaintiffs' or the Court's view might be of what 1252 -- 1225(b)(2)(C) requires, it would -- to implement it necessarily requires the Executive using foreign affairs powers to negotiate with foreign countries.

And I think that -- again, chaos in general is enough, but that's a particular type of chaos, and intrusion on the Executive foreign affairs powers that counsels against any form of injunctive relief here.

THE COURT: So a mixed question of branch and authority between Article I and Article II, much like the Senate has a role in Senate negotiations, ratification of treaties, but it's sort of mixed with the Article II Branch, so it's a mixed question of branch and authority.

Okay. I understand the Government's argument there. I advise you that you have about eight minutes, so any concluding remarks or anything that you need to clean up, you should do it at this time.

MR. WARD: No, Your Honor. If that -- if the Court has no further questions, we'd beyond that just rest on our briefs.

THE COURT: Okay. Thank you for excellent briefing from the United States, excellent oral argument.

At this point, the States of Missouri and Texas have reserved 30 minutes. As the Plaintiff in this action, they may speak last to the Court, and I will defer to

Missouri and Texas on the allocation of that time. You may speak through both counsel or just one.

So you may approach now for any rebuttal. I think I may have promised a 15-minute break. Would that benefit Tex --

MR. THOMPSON: Only if Your Honor would like a break, that's fine with us.

THE COURT: Does Texas or Missouri want a break?

MR. SWEETEN: I think with plane schedules, Your Honor, I think we --

MR. THOMPSON: Yeah.

MR. SWEETEN: -- might want to go forward.

THE COURT: Okay. Let's go ahead and proceed, and you may take 30 minutes. You may allocate your time using whatever metric you deem necessary. Please proceed.

PLAINTIFF TEXAS REBUTTAL

MR. THOMPSON: Thank you, Your Honor. Will Thompson for the Plaintiff states. We're planning on allocating the time to me here, and I'm hoping not to take up 30 more minutes of the Court's time.

With re -- oh, start -- just kind of going in the chronological order that the other side followed unless Your Honor has a different preference. However, I will say at the beginning with regard to standing that I think one of the most important things that my friend on the other side said

was concession maybe halfway through.

The Government agrees, if I got the transcript right, that MPP probably deterred some individuals from coming to the United States. I think that's crucial to us, right?

We already have evidence in the record that we think establishes that, but if the Defendants agree with that, I think that establishes, under preponderance of the evidence scheme, that MPP is having this effect on the number of illegal aliens who enter the United States, and that's exactly the condition that triggers all the financial harms that we discussed in our opening presentation, Your Honor.

With regard to a couple of specific cases that were mentioned, *Crane versus Johnson*, which is at 783 F.3d 244, I believe that that case contains a footnote explaining that the Plaintiffs waived the driver's license theory of standing that we've asserted here.

If Your Honor reviews both the DAPA opinion from the Fifth Circuit and Judge Tipton's opinion from the 100-day pause litigation, we'll see that both of those courts rejected the government's same reliance on *Crane versus Johnson*. This is not a new argument. It's one that has been dealt with in all of these cases.

And I was told that the court reporter would appreciate the spellings for judge names. That Tipton was

T-I-P-T-O-N. The --

THE COURT: And this is Judge Tipton, Southern District of Texas, correct?

MR. THOMPSON: Yes. That is correct, Your Honor.

THE COURT: Okay. Yeah. Let the record so reflect.

MR. THOMPSON: The Federal Government also referred to the number of individuals enrolled in MPP declining over time. My understanding of the Government's argument from its briefs is that this is a reference to basically the COVID Pandemic; that the federal government has what is called Title 42 authority, which is kind of a separate way for processing illegal aliens who cross the border, and that -- but, importantly, it is tied to like a temporary finding from the CDC. This is not something that's going to continue indefinitely. I believe the administration has made public notes about preparing to rescind the Title 42 authority.

So it is true, of course, that with Title 42 taking a front seat in immigration enforcement, the numbers did change for MPP. They obviously didn't go to zero, but that will be undone going forward.

And so just like the Secretary was arbitrary and capricious to worry about superseded events, like previous court closures with regard to prospective effects of terminating MPP, I think the same thing is true here. The

Court should not rely on an inherently transitory Title 42 process that Defendants have said they're going to eventually get rid of when the claim here is for prospective relief going forward, including for time periods when Title 42 will not be in place.

My friends on the other side mentioned the Obama Care case, which I believe was styled *California versus Texas* in the Supreme Court. That just doesn't apply here. I believe we addressed it in the reply brief, but the key distinction is -- at least according to the Supreme Court's majority opinion, in the Obama Care statute, we have these two separate classes of provisions that don't really interact to create the injury. According to the majority opinion, I believe by Justice Breyer, the same injury would have been in place even without the challenged provision.

That's a completely different situation than what we have in this case, which is different laws combine to create an injury, where it is, of course, the government's policy to let someone into the country, and the government's separate policy that we then have to pay for things for that individual. Either one is a -- is a necessary cause, and combined they create that injury completely different than *California versus Texas*.

With regard to traceability, this is, of course, the area where the Supreme Court and the Fifth Circuit have

blessed special solicitude for state plaintiffs. One piece that came up under the rubric of traceability and redressability in the other side's argument, but I think is crucial to understanding remedial questions as well, is the Government said, the Federal Government said, it's not clear that getting rid of the termination memo would actually result in anyone being enrolled in MPP and remaining in Mexico.

This is exactly why my friend, Mr. Osete, was asking for injunctive relief. He said, if we -- if the Court vacates the June 1 Memorandum, then at least in a certain sense MPP is back, but if the Government is saying that MPP being back in that sense isn't sufficient for anyone to ever actually have to remain in Mexico, then it's not really a full remedy for the Plaintiffs' harm here.

I think the injunctive relief in that respect, just to jump around a bit, Your Honor, would be to reinstate the status quo ante. We do know that there was a huge practical difference and legal difference between MPP being in effect and then it being terminated or suspended. It was a difference of at least, I think, 68,000 aliens being enrolled.

So that's the process we should be getting back to, where the line officers are, as my friends on the other side admit, able to enroll people in MPP and create those same

kinds of protections for the states' fiscs.

The Government on behalf of the United States has argued that they cannot reinstate MPP unilaterally. I think that is contradicted by the record. I'm thinking specifically of Appendix Page 307, which says: The U.S. Government initiated MPP pursuant to U.S. law. And then it goes on to say: It has implemented and expanded the program through ongoing discussions with Mexico. So there was an initial part that was unilaterally done by U.S. law, and then there's an additional part that involved some level of cooperation with the Government of Mexico.

The same thing is shown on Page 303 of the Appendix where right after -- this is a DHS memo. Right after DHS explains how it established MPP pursuant to U.S. law, it then concludes the paragraph somewhat curtly: The U.S. has notified the Government of Mexico that it is implementing these procedures under U.S. law. It doesn't say, we engaged in extensive diplomatic negotiations, and that was a necessary prerequisite for us implementing MPP. It just says, we did it under U.S. law. We notified Mexico that it was happening.

And I think one of the reasons this is permissible is, I -- I could be misunderstanding my friend on the other side, but he seems to be focused on the ability to remove someone from the United States and send that person to a

third country. That, I think, is different than simply not letting that person into the United States on the front end. When they show up at a port of entry or something and say, I'm here to apply for asylum; can I enter the United States, the government certainly retains the option of saying, no, you should remain in Mexico without any kind of treaty negotiations with Mexico.

The Federal Government also says that the June 1 Memo considered the effect of terminating MPP on detention capacity. I don't think its citations support that proposition.

The memo in relevant part —— and this is AR006 —— simply says: The department has at its disposal various options, including detention, alternatives to detention, and case management programs, et cetera.

So if the government did in the memo note the possibility of detention, we might disagree with the federal government about when detention is required versus merely an option, but, sure, it noted that detention as an option it has at least in some cases.

It didn't say anything about the feasibility of detention or the feasibility of complying with Section 1225 in light of the termination of MPP. Just as we discussed earlier, Your Honor, that D.C. Circuit opinion saying that, to note the existence of a factor is not the same thing as to

weigh the factor. This isn't even noting the existence of the factor. It's noting a necessary fact that could give rise to consideration of a factor but didn't on this memo.

With regard to reviewability, the Federal Government talks about *Heckler versus Chaney*. I think the premise of that entire discussion is that the termination of MPP is a nonenforcement policy. I don't think that's accurate. We're not talking about a situation where the federal government says, here's an alien, but I don't want to remove him.

The federal government is, in fact, pursuing removal proceedings during the MPP process or without the MPP process. Really either way, the premise of all of these things is that the government thinks the alien is not entitled to be admitted to the United States. The government issues perhaps a notice to appear or takes the alien into custody, but, either way, there are supposed to be enforcement proceedings, and the alien uses as a defense to removal this claim of asylum.

The claim of asylum is not -- there is no nonenforcement. There's just a question of how the government is going about enforcing, and so the difference here is not, shall the government enforce or not enforce, at least as a matter of law. The question is, where shall the alien be while the government is pursuing enforcement. So I

don't think this triggers any of the kind of historic concerns about prosecutorial discretion.

There was also some discussion of the, I believe, 1997 Fifth Circuit opinion, *Texas versus United States*. I believe that is 106 F.3d 166. And, admittedly, I'm doing this from memory, Your Honor, but my recollection is that case was not about particular failings to adhere to particular congressional commands. It is more of a generalized objection that the federal government was just not very good at enforcing the federal immigration laws.

I think that kind of generic generalized grievance is completely different than the sorts of cases that have arisen in more recent years involving, you know, here's a particular statutory violation.

THE COURT: If you can keep track of the *Texas versus United States* cases by memory, that is impressive.

(Laughter.)

MR. THOMPSON: Well, I hope I'm right, Your Honor.

Oh, and the last point on nonenforcement policies is that the *Heckler versus Chaney* case only sets up a presumption. It, in fact, in its own discussion talks about at least two exceptions where nonenforcement policies are reviewable, and I think the best recent discussion of those exceptions is Judge Tipton's order in the Southern District of Texas in the 100-day pause litigation. That's the same

judge who was mentioned earlier.

With regard to statutes precluding review, I think we'll rest on our briefs. I think we addressed each one in particular, but if Your Honor has a particular question about them, we'll, of course, address it.

Zone of interests, I don't think I addressed that in my opening presentation. It is not a high bar, Your Honor. The Fifth Circuit has repeatedly said that the presence of the adverb "arguably" in the standard is meaningful.

Judge Tipton's order, again the same one from the 100-day pause litigation, rejected this very same argument because the INA was meant to help protect state fiscs. It's also worth noting that, if the federal government were right about the zone-of-interests test, I think this would make every recent major immigration case wrongly decided.

And I'll acknowledge that not all of those cases raise the issue, but it would be awfully surprising if the United States Solicitor General, for example, just missed this killer argument in *Regents*.

The Federal Government also mentions —— and I believe this gets more into the merits —— that about one percent of MPP enrollees got relief. I think the Federal Government wants us to infer something nefarious from that, that more of them deserved relief or something.

But it's, or course, equally consistent with the possibility that MPP is doing an excellent job of keeping people who are not entitled to be in the United States from being in the United States.

If only one percent of the people going through the process are ultimately found to be entitled to asylum, it would sure be strange for us to conclude from that that we should let the other 99 percent into the United States' interior in order to disappear only to ultimately have their claims not adjudicated because they disappeared or rejected on the merits.

With regard to which claims the Court should address, the Court earlier asked, I believe a hypothetical, if the Court rules for the Plaintiffs on an arbitrary and capricious claim, should the Court address the Section 1225 claim?

It is certainly within the Court's discretion. I'm not aware of any authority saying the Court has to or cannot, but I think the most applicable discussions of this principle come from, again, the DAPA and DACA cases.

So my recollection is that, in DAPA, Judge Hanen, H-A-N-E-N, from the Southern District of Texas, in the District Court only addressed the procedural argument under notice and comment. He did not address the substantive argument.

And then, on appeal, Judge Smith, writing for the Fifth Circuit, decided to address the substantive argument as well. And I don't think there was any criticism of Judge Hanen in that. It was just he thought it would be useful, because the scope of relief can at least arguably be altered by that.

What the federal government could or should do on any kind of remand is, of course, affected by whether its policy choice was only unlawful because of the way it explained it or it was also unlawful because of the substantive outcome reached.

And it's worth noting that Judge Hanen decided in the DACA case, he then addressed both the procedural and substantive arguments in his more recent order from last week.

With regard to remedies, I think the key point here is to restore the status quo ante. We need to get back to a place where the federal government has a real MPP program in place because the termination of it was unlawful.

I think an injunction -- the scope of the injunctive relief depends in part on how the Court rules on the various claims and whether the Court addresses those claims, but, by analogy, in some of these procedural cases that, say, involve notice and comment, the injunction will say: The federal government may not implement this memo at

least unless or until it is reenacted following notice and comment procedures.

So with regard to an arbitrary and capricious challenge, similar relief will say something like: The government may not enforce this memo unless and until it, you know, goes through the process again and does it in a nonarbitrary way.

Of course, if the Court finds that the Plaintiffs prevail on a Section 1225 theory, then it becomes a little bit different, because a mere going through the motions again, even non-arbitrarily, wouldn't satisfy the substantive concerns there.

I think that concludes everything I wanted to say in rebuttal unless the Court wanted me to address the Larson point that it raised.

THE COURT: No. One law review response is sufficient for the day.

(Laughter.)

MR. THOMPSON: Very well.

THE COURT: I do not think this case will rise and fall on the Larson Doctrine, but it's a nagging question.

So I think the Government credibly provided its point or perspective on that, and I don't anticipate it will play an outsize role in adjudicating any of the four claims.

So, with that, does the Government rest and close

its case?

MR. THOMPSON: We do, Your Honor. We thank Your Honor for your attention to this matter and ask --

THE COURT: Okay. And I did want to note for the record that this Court does find that Texas Solicitors General do not routinely miss killer arguments.

(Laughter.)

THE COURT: Without commenting on the current argument, I don't find that the Texas SG routinely misses killer arguments.

So, at this point, the Court has heard the evidence and the arguments presented by both Plaintiffs and Defendants and will issue an Order Memorandum Opinion in the coming weeks.

The parties will be ordered to submit proposed findings of fact and conclusions of law and proposed remedy language, if applicable, by 5:00 p.m. Central Time on Tuesday, July 27, 2021. I'm ordering that from the bench, but that will also be followed by written order on ECF. So you'll have that particular date on the docket.

I will also instruct Texas to provide a courtesy copy of its demonstrative exhibit. That will not be made part of the record, but I was furiously taking notes on some of the citations. I could rely on the transcript, of course, but I think a quicker way to get some of those citations

would be to those slides. I'll just ask that you provide a courtesy copy to my courtroom deputy.

And regarding transcripts, if either the States or the United States request an expedited transcript, please process that request through my courtroom deputy, and I'll make instructions and accommodations for that.

Bear in mind that we have a heavy criminal docket and one court reporter, so we may need to modify any expedited transcript request to accommodate bandwidth issues.

Other than that, I think that's it for housekeeping.

Anything else that should be addressed while I have all the parties and attorneys present?

MR. THOMPSON: Not from Plaintiffs, Your Honor.

THE COURT: Anything from the United States?

MR. WARD: Nothing further from the United States, Your Honor.

THE COURT: This Court is adjourned. The Court stands in recess for the remainder of the day.

Counsel and parties are excused.

COURT SECURITY OFFICER: All rise.

(End of proceedings for 07/22/2021.)

* * * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

s/Stacy Mayes Morrison
Stacy Mayes Morrison
Official Court Reporter

7/26/2021
Date